83-918

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1983

DALE M. CARTER,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

On Appeal From The Illinois Supreme Court

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether, on their faces, the criminal provisions of the Illinois Franchise Disclosure Act violate Fourteenth Amendment equal protection and due process because:

(1) Section 12 of the Act delegates to the prosecutor an unmitigated power to grant total *in futuro* exemption from the Act's criminal provisions to any person he chooses "in the public interest," thus enabling him to amend or repeal the statute at will.

(2) Section 32 of the Act authorizes the prosecutor to keep his "public interest" exemptions secret if he says he is acting "in the public interest."

(3) Count Three of the indictment and Section 6 of the Act ("fraud and deceit") are void for vagueness as a consequence of the Act's provision that "fraud" and "deceit" are "not limited to common law fraud or deceit," and for other reasons.

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OPINIONS BELOW

The opinion of the Illinois Supreme Court is reprinted in Appendix A. It is reported at 97 Ill.2d 133, 454 N.E.2d 189 (1982).

The opinion of the Illinois Appellate Court for the First District is reprinted in Appendix B. It is reported at 102 Ill.App.3d 796, 430 N.E.2d 31 (1981).

JURISDICTION

This is an appeal from a judgment of the Supreme Court of Illinois affirming a felony conviction for viola-

tion of the Illinois Franchise Disclosure Act. The Illinois judgment was entered on December 17, 1982, rehearing denied, September 30, 1983. Notice of Appeal was filed in the Supreme Court of Illinois on October 11, 1983. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment 14, Section 1, Clauses 2 and 3:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The provisions of the Illinois Franchise Disclosure Act (the "Act"), Ill.Rev.Stat. ch. 121-½, ¶701, *et seq.* (1981) are set forth in Appendix E. We here present excerpts, adding italics for clarity:

> §3. *Definitions.* • • • (11) "Fraud" and "deceit" are not limited to common law fraud or deceit. • • • • (20) "Administrator" means the Illinois Attorney General.
>
> • • • •
>
> §4. *Prohibited practices.* (1) It is unlawful for any franchise to be . . . sold . . . by any person who is subject to this Act and is not first registered pursuant to Section 16.1 *unless exempt from registration.*
>
> • • • •
>
> §6. *Fraudulent practices.* (1) It is unlawful for any person, in connection with the offer or sale of any franchise, to directly or indirectly: • • • • (c) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.
>
> • • • •

§12. *Exemptions* . . . . The Administrator may by rule or order . . . *exempt any . . . franchisor . . . from Sections* 4, 16, *or* 16.2 *of this Act if he finds that the enforcement of this Act is not necessary in the public interest* . . . .

• • • •

§16. *Filing requirements* . . . . No franchisor . . . may sell . . . franchises . . . unless such person shall file with the Administrator . . . disclosure statements . . . .

§16.1 *Registration* . . . . The franchisor . . . shall register each salesperson . . . by filing an application containing the information required by Section 16 . . . .

§16.2. *Period of effectiveness* . . . . The registration . . . and the disclosure statement . . . shall be effective for a period of one year . . . .

• • • •

§20. *Criminal prosecution.* Any person who willfully sells a franchise in this state without complying with Sections 4, . . . 16 or 16.1 of this Act . . . commits a . . . felony . . . . The Administrator . . . shall commence and try all prosecutions under this Act . . . .

• • • •

§32. *Public Inspection.* (a) • • • • All disclosure statements and other papers . . . shall be open to public inspection, *except* that the Administrator may, in his discretion, withhhold from public inspection any information the disclosure of which is, in the judgment of the Administrator, *not necessary in the public interest* . . . .

STATEMENT OF THE CASE

The Court below accurately states the facts. App. A. Essentially, appellant was convicted and sentenced to three years imprisonment for the felony of selling an unregistered franchise and defrauding the purchaser in violation of the Illinois Franchise Disclosure Act.

Appellant asserts the facial unconstitutionality of the Act's Section 12 (exemptions "in the public interest") which expressly controls the felony-defining Sections 4, 16, and 16.2 on which his convictions were based.* The relationships among these sections were carefully defined by the Appellate Court (App. B) and accepted by the Illinois Supreme Court.

The Illinois Supreme Court majority specifically decided the Fourteenth Amendment issue on its merits against appellant. Justice Simon, dissenting, voted to reverse the conviction on that same ground. Appellant had raised these issues at pages 11-20 and 23-24 of his Illinois Supreme Court brief.

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* Appellant was convicted on four counts, three of which directly involve Section 12: Count One (§§4, 16), Count Two (§4), Count Four (§§16.1, 16.2).

Appellant was also convicted under the fraud section of the Act (see p. 10, below) which is not controlled by Section 12. However, since the verdict was general (R. 506, 507, 510) the invalidity of the other three counts requires a new trial. See, *e.g.*, *Sandstrom* v. *Montana*, 442 U.S. 510, 526 (1979); *Eaton* v. *City of Tulsa*, 415 U.S. 697, 699 n. (1974). That is why the Illinois Supreme Court addressed the merits of our constitutional claim.

The Illinois Appellate Court recognized appellant's federal claim, App. B, but elected to sustain that claim on the basis of the separation of powers provision of the Illinois Constitution. Appellant had raised the federal issues at pages 23-30 of his Appellate Court brief and 3-7 of his reply brief.

In the trial court, the federal issues were raised in the Supplement to Defendant's Motion in Arrest of Judgment, R. 874-78, which was denied.

STATEMENT OF THE REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

The ten Appellate Court and Supreme Court judges in this case have divided evenly on the merits of appellant's claims.

Mr. Justice Simon, dissenting below, summarized the issue:

> "The majority upholds section 12 of the . . . Act . . . which grants the Illinois Attorney General the power to exempt individuals from criminal penalties provided in the Act. The Attorney General's power to grant exemptions is limited only by the highly indefinite requirement that the exemption be 'in the public interest.'
>
> This precedent could undermine civil liberties in a time of crisis. The legislation grants the Attorney General the power to create a privileged class that is exempt from the criminal law which the rest of society must obey. At the same time the legislation fails to establish articulable standards for the Attorney General to use in making such a momentous decision."

Almost thirty years ago, Justice Black warned us:

> "A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. . . .
>
> A congressional delegation of such vast power to the prosecuting department would raise serious constitutional questions. . . ."
>
> *Berra* v. *United States,* 351 U.S. 131, 139-40 (1956) (dissenting opinion).

This Court, echoing Chief Justice Marshall in *United States* v. *Wiltberger,* 18 U.S. (5 Wheat.) 76, 95 (1820), has put the question in terms of the federal distribution of powers while remaining silent on the intimately related Fourteenth Amendment issue:

> "In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial functions."
>
> *United States* v. *Evans,* 333 U.S. 483, 486 (1948).

This is the first time the Fourteenth Amendment question has been raised in this Court.

The Illinois system of prospective criminal exemptions, controlled by nothing more than the prosecutor's say-so as to "the public interest" is a flat violation of equal protection and due process. It violates those clauses for reasons which are tied to the difference between the traditional post-crime exercise of prosecutorial discretion, and the Illinois system of *in futuro* criminal exemptions.

Even the traditional discretion carries its dangers. Thurman Arnold said it:

> "The idea that a prosecuting attorney should be permitted to use his discretion concerning the laws which he will enforce and those which he will disregard appears to the ordinary citizen to border on anarchy."
>
> Arnold, *Law Enforcement—An Attempt at Social Dissection,* 42 Yale L.J. 1, 7 (1932).

But here we deal with a power more dangerous by far: Illinois has transformed the traditional discretion into an unprecedented and ominous power in the prosecutor to *repeal the statute* as to favored individuals or groups.

The stake is personal liberty. The equal protection standard is therefore "strict scrutiny." See the cases collected in *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 313 n. 3 (1976).

Kenneth Culp Davis defined the danger which requires the standard:

> "A fundamental fact about the discretionary power to be lenient is extremely simple and entirely clear and yet is usually overlooked: The discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate."
>
> Davis, *Discretionary Justice* 170 (1969).

Like Judge Arnold, Professor Davis is merely identifying a danger which flows from the traditional discretion of the prosecutor. But here the dangers are multiplied exponentially by the delegation of power to confer *prospective* exemption from the criminal law and thus a power to amend the statute. That is why the law of England has forbidden the King to do it since the 17th Century.

The 17th Century barristers knew that the King's *in futuro* dispensation of a statute was actually a power to amend it, and they said so explicitly, see 6 Holdsworth, *History of English Law,* 216-25, 240-41 (1924). *See, e.g., Case of the Seven Bishops,* 12 State Tr. 183, 367 (1688). Justice Powell charged the jury in that case:

> "[This] amounts to an abrogation and utter repeal of all the laws. . . . If this be once allowed of, there will need no Parliament; all the legislature will

> be in the king, which is a thing worth considering, and I leave the issue to God and your conscience."
> 12 State Tr. at 427.

The arbitrary power here conferred upon the Illinois Attorney General *on its face* violates equal protection and due process, see *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373 (1886), because, *id.* at 368:

> "[I]t divides the owners . . . into two classes, not having respect to their personal character and qualifications . . . but merely by an aribtrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure."

The 20th Century reports of this Court are full of equal protection cases involving arbitrary classifications based on *something*: race, religion, sex, or whatever. But the delegation of criminal law-making power to a prosecutor based on nothing more than a patriotic cliche, "the public interest," sets some kind of 20th Century record.

Illinois has specifically held that this egregious statute is good under the Fourteenth Amendment.* That

---

* Having based its decision on the Fourteenth Amendment, the Illinois Court remarks that the prosecutor will likely be fair in exempting his favorites because his rules "provid[ing] the procedure" and his "final administrative decisions" are reviewable under the Illinois Administrative Review Act. (App. A) But that prophesy is totally irrelevant to the federal issue because:

1. The issue is the constitutionality of the statute *on its face,* not the Attorney General's rules or conduct

decision not only sanctifies the statute, it debases the Amendment. It needs correction, lest the detested principles of the *Yick Wo* legislators, not to mention the Stuart kings, return to plague us.

II.

Appellant was convicted under Count Three of the indictment of violating the fraud section (Section 6) of the Act. Justice Moran, dissenting below, held that Section 6 was unconstitutional because its key terms, "fraud and deceit," were too vague, because the Act says they are "not limited to common law fraud or deceit." Act, §3(20).

• (Continued)

under it. Reviews of his fairness in wielding an unconstitutional power are beside the point.

2. In any event, the Attorney General is empowered to change or repeal his rules on relatively short notice, Ill.Rev.Stat. ch. 127, ¶¶1005.01, .02 (1981). That makes the "protection" of his rules an illusion.

3. In any event, the rules (App. F, Rule 206) don't protect anything; they are purely procedural; they have nothing to do with the substantive "public interest" standard.

4. In any event, the secrecy provision of Section 32 invites the Attorney General to suppress the relevant information, his lucky beneficiaries will not challenge him in the courts, and the rules contain no provision for notifying anybody else, with or without a secrecy order. There has never been a criminal exemption review and there is never going to be one. Judicial review is a mirage.

For these reasons, Section 6 is unconstitutionally vague and Count Three is void.

Respectfully submitted,

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APPELLANT'S APPENDIX

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APPENDIX A

Opinion of the Illinois Supreme Court in People v. Carter, 97 Ill.2d 133, 454 N.E.2d 189 (1982), majority opinion dated December 17, 1982, rehearing denied September 30, 1983.

OPINION

SUPREME COURT OF ILLINOIS

United States of America

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the*

eighth *day of* November *in the year of our Lord, one thousand nine hundred and*

eighty-two *, within and for the State of Illinois.*

PRESENT: HOWARD C. RYAN, CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD — JUSTICE DANIEL P. WARD

JUSTICE JOSEPH H. GOLDENHERSH — JUSTICE WILLIAM G. CLARK

JUSTICE THOMAS J. MORAN — JUSTICE SEYMOUR SIMON

TYRONE C. FAHNER, ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST: H. [redacted] CLERK
JULIANN HORNYAK

Be It Remembered, *that afterwards, to-wit, on the* 17th *day of* December *, 19* 82

the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

People State of Illinois,

Appellant

No. 56106 vs.

Dale M. Carter,

Appellee

Appeal from
Appellate Court
First District

Docket No. 56106—Agenda 8—September 1982.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. DALE M. CARTER, Appellee.

JUSTICE GOLDENHERSH delivered the opinion of the court:

Following a jury trial in the circuit court of Cook County defendant, Dale M. Carter, was convicted of violations of the Franchise Disclosure Act (hereafter the Act) (Ill. Rev. Stat. 1977, ch. 121½, par. 701 *et seq.*) and sentenced to three years in the custody of the Department of Corrections. Defendant appealed and the appellate court, holding that section 12 of the Act was unconstitutional (Ill. Rev. Stat. 1977, ch. 121½, par. 712), reversed the judgment. (102 Ill. App. 3d 796.) We allowed the People's petition for leave to appeal as a matter of right. 73 Ill. 2d R. 317.

The facts are adequately stated in the opinion of the appellate court. In a four-count indictment it was charged that defendant, chairman of the board of Pie Tree, Inc., violated various provisions of the Act in the sale of a franchise to Roger Collier. Count I charged the sale of an unregistered franchise, a violation of sections 4(1) and 16 of the Act; count II charged failure to provide Collier with a disclosure document as required by section 4(2) of the Act; count III charged failure to place into escrow the moneys received in the sale, in violation of section 6 of the Act; and count IV charged the failure to register all franchise sale persons, in violation of section 16.1 of the Act.

In pertinent part section 12 provided:

> "The [Attorney General] may by rule or order, and subject to such terms and conditions as he may prescribe, exempt any franchise, franchisor, subfranchisor, franchise broker, or salesperson from Sections 4, 16 *** of this Act if he finds that the enforcement of this Act is not necessary in the public interest ***." (Ill. Rev. Stat. 1977, ch. 121½, par. 712.)

The appellate court concluded:

> "[T]he phrase 'in the public interest' is not an intelligible limitation on the exemption power in the context of an F.D.A. criminal prosecution. Consequently, when considered in conjunction with section 20, section 12 of the F.D.A. is an unconstitutional delegation of legislative power." 102 Ill. App. 3d 796, 800.

The People contend that the defendant was without standing to attack the validity of the Act. Although this contention is not entirely without merit, we have elected to consider the constitutional question presented. Defendant contends that "in the public interest" is "not an intelligible standard" and that the statute creates an invalid delegation of legislative authority. We do not agree.

This court has enunciated the criteria relevant to examining the validity of a legislative delegation of power to an administrative agency. In *Hill v. Relyea* (1966), 34 Ill. 2d 552, 555, this court stated:

> "Absolute criteria whereby every detail necessary in the enforcement of a law is anticipated need not be established by the General Assembly. The constitution merely requires that intelligible standards be set to guide the agency charged with enforcement [citations], and the precision of the permissible standard must necessarily vary according to the nature of the ultimate objective and the problems involved. [Citations.]"

See also *Polich v. Chicago School Finance Authority* (1980), 79 Ill. 2d 188, 206; *Polyvend, Inc. v. Puckorius* (1979), 77 Ill. 2d 287, 300.

We are of the opinion that "in the public interest" is not an improper standard for delegation. In *International Ry. Co. v. Public Service Com.* (1942), 264 A.D. 506, 36 N.Y.S.2d 125, the Appellate Division of the Supreme Court of New York persuasively refuted defendant's argument:

> "It must be conceded that a criterion of 'public interest,' standing alone, presents a standard of immense and varied implications. And if it can only be interpreted as setting up a standard so embracive and indefinite as to confer unlimited power, then, of course, it runs counter to the rule against the complete delegation of legislative power. [Citation.] But in our opinion it need not be and should not be so interpreted. Rather, it should be construed with reference to the general purposes and the subject matter of the [law in question], and if it may be logically found that the criterion of 'public interest' is directly related and limited to the general purposes of such law then it is a sufficient guide. [Citations.]" (264 A.D. 506, 510, 36 N.Y.S.2d 125, 131, *aff'd* (1943), 289 N.Y. 830, 47 N.E.2d 435.)

In *American Power & Light Co. v. Securities & Exchange Com.* (1946), 329 U.S. 90, 104, 91 L. Ed. 103, 115, 67 S. Ct. 133, 142, the Supreme Court noted that delegation standards should not be tested in isolation because "They derive much meaningful content from the purpose of the

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Act, its factual background and the statutory context in which they appear." In *Northern Illinois Auto Wreckers & Rebuilders Association v. Dixon* (1979), 75 Ill. 2d 53, 61, this court recognized that in order to determine whether a rule promulated by the Secretary of State was consistent with the "public interest" depended upon the purposes of the pertinent statute.

With respect to the act involved here, the legislative findings and statement of purposes contained in the Act (see Ill. Rev. Stat. 1977, ch. 121½, par. 702) make it clear that the purposes of the Act are to protect the investments of people buying franchises and to insure that before entering into a franchise agreement they are fully informed of the franchisor's financial condition. Section 5 of the Act sets forth the information that must be contained in the disclosure statement which under section 4 of the Act must be provided a purchaser and under section 16 must be filed with the Attorney General. Franchisors whose shares are registered with Securities Commissions and listed on Securities Exchanges are required to furnish statements containing at least as much information as is required under section 5. Where the information is thus readily available through other sources, the Attorney General might find that enforcement of the Act is not necessary. When considered in light of the purposes of the Act the standard "in the public interest" is an intelligible standard which survives constitutional scrutiny.

The delegation here is certainly no broader or more unintelligible than the delegation in *Hill v. Relyea* (1966), 34 Ill. 2d 552. In *Hill*, the statute gave the superintendent of the hospital in which a mentally retarded person was being treated the power and authority to discharge patients "as the welfare of such person and the community may require." (34 Ill. 2d 552, 555.) This court noted that the superintendent of the hospital and his staff were in a much more advantageous position to determine when the welfare of the person and of the community required a discharge of a hospitalized mentally retarded person and that "The nature of the objectives to be achieved and the problems to be solved negate the usefulness of setting more precise legislative standards." (34 Ill. 2d 552, 556.) Here the expertise and the availability of the information necessary to determine when prospective franchisees do not require the protection of escrowed moneys and financial disclosure statements place the Attorney General in a position to de-

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termine when "the enforcement of this Act is not necessary in the public interest" (Ill. Rev. Stat. 1977, ch. 121½, par. 712) and negate the desirability of more precise standards.

Defendant contends that the statute, in violation of the equal protection and due process clauses of the United States and Illinois constitutions, grants the Attorney General "unrestricted future exemption power." He contends further that delegation to the Attorney General of such unrestricted criminal-exemption power violates the separation of powers clause found in section 1 of article II of the 1970 Constitution. The rules promulgated by the Attorney General pursuant to section 27 of the Franchise Disclosure Act (Ill. Rev. Stat. 1977, ch. 121½, par. 727) and in accordance with the Illinois Administrative Procedure Act (Ill. Rev. Stat. 1977, ch. 127, par. 1001 *et seq.*) provide the procedure for securing an order of exemption. The Illinois Administrative Procedure Act (Ill. Rev. Stat. 1977, ch. 127, par. 1001 *et seq.*) provided:

> "No action by any agency to adopt, amend or repeal a rule after this Act has become applicable to the agency shall be valid unless taken in compliance with this Section." (Ill. Rev. Stat. 1977, ch. 127, par. 1005(c).)

Section 5(a)(1) of the Illinois Administrative Procedure Act provided for the giving of notice to the general public, at least 45 days in advance of a rule's effective date, as to the text of the rule, the statutory authority giving the agency the power to promulgate the rule, and other pertinent information. (Ill. Rev. Stat. 1977, ch. 127, par. 1005(a)(1).) Section 29 of the Franchise Disclosure Act (Ill. Rev. Stat. 1977, ch. 121½, par. 729) provided that all final administrative decisions of the administrator are reviewable under the Administrative Review Act. With these safeguards it is difficult to conclude that the Attorney General is vested with either "unrestricted criminal exemption power" or that the statute, as applied, fails to provide either equal protection or due process. Defendant's contention that the "delegation to the Attorney General of an unrestricted criminal exemption power violates the separation of powers" rests on the erroneous premise that the power is arbitrary and unrestricted. Clearly, the power, as delegated, does not violate the separation of powers.

Defendant contends that the indictment is insufficient in that it fails to charge a criminal offense. Insofar as his challenge is directed to counts I, II and IV it falls with our

holding that sections 12 and 20 of the Act are not invalid. The challenge to count III presents a different question.

Count III charges that defendant engaged "in an act, practice or course of business which operated as a fraud and deceipt [*sic*] upon Roger Collier, in violation of Illinois Revised Stats., 1977, as amended Chapter 121½ par. 706. to wit: failing to place the franchise fee paid by Roger Collier in an escrow account as required by the Illinois Attorney General's Office." It is defendant's contention that count III "charges an offense never created by the legislature." He argues that no statute makes it a crime to fail to do anything "as required by the Illinois Attorney General's Office."

Section 11 of the Franchise Disclosure Act (Ill. Rev. Stat. 1977, ch. 121½, par. 711) provides that if the Attorney General finds that a franchisor has failed to demonstrate that adequate financial arrangements have been made to fulfill his obligations he may, by rule or order, require the escrow of franchise fees until the obligations have been fulfilled. Section 11 also provides that at the option of the franchisor a surety bond may be furnished in lieu of the escrow.

In our opinion count III is adequate to charge a violation of section 6, alleging that the device to defraud was the failure to place the franchise fee in an escrow account. Section 6(1)(a) of the Act (Ill. Rev. Stat. 1977, ch. 121½, par. 706(1)(a)) provides that it is unlawful to employ any device, scheme or artifice to defraud, and the offense alleged is a violation of section 6(1)(a) based on a requirement contained in section 11. Furthermore, it was clearly adequate to enable the defendant to be fully advised of the nature of the charge and to prepare his defense. (See *People v. Pujoue* (1975), 61 Ill. 2d 335, 339; *People v. Walker* (1980), 83 Ill. 2d 306, 313-14.) Any additional information which he might have required could have been obtained by filing a motion for a bill of particulars. We hold that counts I, II, III, and IV of the indictment do not fail to meet the requirements of either the Federal or Illinois constitutions.

Defendant contends that the evidence fails to prove him guilty beyond a reasonable doubt. He argues that there is no showing that the attorney, to whom the Attorney General directed the letter concerning the escrow of funds, received the letter, or that its contents were in any manner communicated to the defendant.

The record shows that all communications with defend-

ant of the Attorney General, as administrator under the Act, were through the attorney, Mr. Beatty. There was no requirement that the Attorney General advise the defendant of the statutory provision or of the rules promulgated under the authority of the statute. The testimony shows that the letter was sent to Mr. Beatty, to whom all correspondence with Pie Tree was to be directed. That fact, when considered with other correspondence in evidence, was sufficient proof that the information concerning the need for the escrow was conveyed to defendant.

As previously noted, the rules provided the method for obtaining an exemption and for administrative review in the event of a denial of an application for such exemption. There is no evidence of any attempt to comply with the statute or in any manner pursue the procedures which would have exempted the defendant from such compliance. We hold that the evidence is sufficient to prove the defendant guilty of the offense charged beyond a reasonable doubt.

Defendant contends that the circuit court erred in the giving of the issues instruction. The record shows that in the conference no question was raised concerning the instruction and that it was given without objection. "[T]he waiver rule does not apply to *substantial defects* in instructions *if the interests of justice require.*" (*People v. Roberts* (1979), 75 Ill. 2d 1, 11.) From our examination of the instructions we conclude that there were no substantial defects and the record presents no plain error and no reason for the application of our rule concerning waiver.

Finally defendant contends that his sentence is excessive. He states that shortly after he was sentenced in this case he was sentenced to a five-year term in Georgia which was to be served concurrently with the sentence imposed in this case. He argues that because he had not as yet been sentenced in Georgia there was no way in which the Illinois sentence could be made concurrent with that in Georgia, and that he will be required to serve a total of eight years on the two commitments. Under the circumstances existing at the time the sentence was imposed it is apparent that there was no basis on which the circuit court could have considered making the sentence concurrent with that in Georgia. There is, however, no impediment to the defendant's applying to the circuit court for a reduction of sentence in accordance with section 5—8—1(f) of the Unified Code of Corrections (Ill. Rev. Stat. 1981, ch.

38, par. 1005—8—1(f)).

For the reasons herein stated, the judgment of the appellate court is reversed and the judgment of the circuit court of Cook County is affirmed.

Appellate court reversed;
circuit court affirmed.

JUSTICE MORAN, concurring in part and dissenting in part:

JUSTICE SIMON, also concurring in part and dissenting in part:

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38, par. 1005—8—1(f)).

For the reasons herein stated, the judgment of the appellate court is reversed and the judgment of the circuit court of Cook County is affirmed.

Appellate court reversed; circuit court affirmed.

JUSTICE MORAN, concurring in part and dissenting in part:

I concur in the judgment as to counts I, II and IV but dissent from the results reached as to count III. In my opinion the specific section of the statute under which the defendant was charged in this count is invalid due to vagueness.

The indictment charged defendant with a fraudulent practice in that he wilfully sold a franchise by engaging in an act, practice or course of business which operated as a fraud and deceit, to-wit: failing to place the franchise fee paid by the complainant in an escrow account as required by the Illinois Attorney General's office.

The Franchise Disclosure Act (Act) provides for both civil and criminal sanctions for violation of its provisions. Section 6(1)(c), under which the defendant was indicted in count III, states:

> "Fraudulent practices.
>
> (1) It is unlawful for any person, in connection with the offer or sale of any franchise, to directly or indirectly:
>
> • • •
>
> (c) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." (Ill. Rev. Stat. 1977, ch. 121½, par. 706(c).)

§6

Anyone found guilty of violating this section commits a Class 4 felony and is subject to imprisonment for a term of one to three years.

The use of the words "fraud or deceit" under section 6(1)(c) would, ordinarily, create no problem since they have a well-settled meaning in the common law. But the Act goes further. Section 3(11) states that the words " 'Fraud' and 'deceit' are not limited to common law fraud or deceit." (Ill. Rev. Stat. 1977, ch. 121½, par. 703(11).) Since the words are not limited to their common law meaning, then what are the elements of this new, open-ended crime of "fraud and deceit"? I suggest there are none. Without knowing the elements of a crime, how will a person be able to conform his conduct so as to be within the law?

Sent 6-17-83

Over 50 years ago, the United States Supreme Court expressed, better than I, why a penal statute must be explicit, when it stated:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.* (1926), 269 U.S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126, 127.

For the reasons stated, I would affirm that part of the appellate court judgment reversing the conviction based on count III of the indictment.

JUSTICE SIMON, dissenting:

The majority upholds section 12 of the Franchise Disclosure Act (Ill. Rev. Stat. 1977, ch. 121½, par. 712), which grants the Illinois Attorney General the power to exempt individuals from criminal penalties provided in the Act. The Attorney General's power to grant exemptions is limited only by the highly indefinite requirement that the exemption be "in the public interest."

This precedent could undermine civil liberties in a time of crisis. The legislation grants the Attorney General the power to create a privileged class that is exempt from the criminal law which the rest of society must obey. At the same time the legislation fails to establish articulable standards for the Attorney General to use in making such a momentous decision.

In reaching its decision the majority principally relies upon precedent arising from civil cases. Given the criminal context of this case, is this reliance not misplaced? I would hold that the public-interest exemption is unconstitutional, violating both equal protection (Ill. Const. 1970, art. I, sec. 2; U.S. Const., amend. XIV, sec. 1) and the nondelegation doctrine (Ill. Const. 1970, art. II, sec. 1, art. IV, sec. 1).

I

Equal protection of the laws: The majority asserts that other courts have approved of the "public interest" standard in many civil contexts and that this court has tradition-

ally applied an extremely deferential scrutiny to legislative classifications in economic-regulatory statutes. In the cases cited by the majority, however, criminal liability never directly hinged upon the "public interest" classification, while in the present case the "public interest" standard determines who is subject to criminal liability and who is exempt.

Because of the criminal context, it is inappropriate to apply in this case the extremely deferential standard of review that this court has used in evaluating the constitutionality of legislative classifications in the field of economic regulation. When a statute grants an executive officer the power to exempt certain persons from *criminal* liability, equal protection should require that the legislature clearly and definitely specify under what circumstances the exemption is to apply. Otherwise there is always a danger that the exemption is designed for an illegitimate purpose. Justice Jackson recognized the dangers of arbitrary exemptions from general legislative schemes when he observed:

> "[I]t [is] a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *Railway Express Agency, Inc. v. New York* (1949), 336 U.S. 106, 112-13, 93 L. Ed. 532, 540, 69 S. Ct. 463, 466-67 (Jackson, J., concurring).

To survive analysis under the equal protection clause a statute must have a *legitimate* purpose. For example, "a bare congressional desire to harm a politically unpopular group" is not a *legitimate* governmental interest. *United States Department of Agriculture v. Moreno* (1973), 413 U.S. 528, 534, 37 L. Ed. 2d 782, 788, 93 S. Ct. 2821, 2826.

The majority observes that the purpose of the exemption is evident in the statement of the legislature's purpose

in enacting the Franchise Disclosure Act. But the majority is simply mistaken when it claims that the only purpose of the legislature was to ensure that franchisees receive information about the *financial* health of the franchisor before they purchase a franchise. Section 2 of the Act clearly sets forth the purpose of the disclosure requirements:

> "(1) The General Assembly finds and declares that the widespread sale of franchises is a relatively new business phenomenon which has created numerous problems in Illinois. Illinois residents have suffered substantial losses where the franchisor or his representative has not provided full and complete information regarding the *franchisor-franchisee relationship, the details of the contract between the franchisor and franchisee*, the prior business experience of the franchisor and other factors relevant to the franchise offered for sale.
>
> (2) It is the intent of this Act: (a) to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered for sale; and (b) *to protect the franchisee and the franchisor by providing a better understanding of the business and the legal relationship between the franchisor and the franchisee.*" (Emphasis added.) (Ill. Rev. Stat. 1977, ch. 121½, par. 702.)

As the emphasized language indicates, the aim of the Act is to ensure that Illinois franchisees have maximum access to information not only about the financial health of the franchisor, but the terms and conditions of the franchise contract as well. (See also Ill. Rev. Stat. 1977, ch. 121½, pars. 705(18) through 705(21) (disclosure statement must contain information about whether franchise must be owner operated; whether franchise contract contains territorial protection clause or covenant not to compete; and whether and upon what conditions the franchisor may terminate the franchise).) This policy is as applicable to franchisors who have already disclosed *financial* information to the Securities and Exchange Commission and other public agencies as it is to all other franchisors; it is anomalous to view this language as providing support for an exemption from the disclosure requirements created by the Act.

The legislature's purpose in creating the "public interest" exemption does not appear in either the statute or in the legislative history of the statute. In such circumstances I believe that the legislative classification must bear a fair and substantial relationship to the purposes that the People's counsel in a litigated proceeding attribute to the legislature. *Cf. Schweiker v. Wilson* (1981), 450 U.S. 221, 244-

45, 67 L. Ed. 2d 186, 204-05, 101 S. Ct. 1074, 1088 (Powell, Brennan, Marshall & Stevens, JJ., dissenting).

The People assert and the majority agrees that the purpose of the "public interest" exemption is to exempt franchisors from the disclosure requirements when the *financial* information that they must disclose under the statute is available from other sources. If this were the real purpose of the exemption, the legislature could easily have stated it in specific language. As stated, the "public interest" standard is too vague to guarantee that is how it will be applied. The "public interest" standard is more of a slogan than an articulable and reviewable standard. This vague standard would sustain an exemption for many franchisors even though information about their financial condition is not available from any other sources. The same vague standard could also be used to deny the exemption to some franchisors even though such information is readily available. The imprecision of the "public interest" standard is too obvious to withstand equal protection scrutiny in this criminal proceeding. Because the exemption power granted to the Attorney General is unconstitutional, the criminal sanctions imposed in this case are void.

II

The "public interest" exemption provided in section 12 also violates the nondelegation doctrine. This court has often recognized "the guiding principle that intelligible standards or guidelines must accompany legislative delegations of power." (*Thygesen v. Callahan* (1979), 74 Ill. 2d 404, 408.) This principle arises both from the separation of powers doctrine (Ill. Const. 1970, art. II, sec. 1, art. IV, sec. 1) and from the recognition that the delegation of pervasive legislative powers to the executive can ultimately endanger civil liberties.

In *Stofer v. Motor Vehicle Casualty Co.* (1977), 68 Ill. 2d 361, this court established a three-part test for reviewing legislative delegations of power to the executive. In order to be valid the legislature must sufficiently identify:

> "(1) The *persons* and *activities* potentially subject to regulation;
>
> (2) the *harm* sought to be prevented; and
>
> (3) the general *means* intended to be available to the administrator to prevent the identified harm." 68 Ill. 2d 361, 372.

The exemption provided for by section 12 of the Fran-

chise Disclosure Act fails to comply with these requirements. Neither section 12 nor any other provision of the Act identifies what *persons* are to receive the exemption or what *harm* the legislature sought to avoid by providing this exemption from the statute's criminal penalties. The "public interest" criteria established in section 12 provides only a vague and inappropriate guide to the Attorney General for evaluating a franchisor's application for the exemption.

In *Thygesen v. Callahan* (1979), 74 Ill. 2d 404, this court declared unconstitutional a statute that authorized the Director of Financial Institutions to establish a maximum fee schedule for community currency exchanges. The only limitation on the Director's power to establish the rates was that they be "reasonable" and "relevant." (Ill. Rev. Stat. 1977, ch. 16½, par. 49.) The court declared that such " 'uncabined discretion' " is unconstitutional, especially where the legislature also failed to communicate to the Director the harm that it intended to prevent in mandating a maximum fee schedule. 74 Ill. 2d 404, 411, quoting *Stofer v. Motor Vehicle Casualty Co.* (1977), 68 Ill. 2d 361, 373.

The "public interest" standard involved in this case is no more specific than the "reasonable" and "relevant" standard involved in *Thygesen*. Moreover, the *harm* to be alleviated by the exemption is no more precisely identified here than it was in *Thygesen*. Contrary to the majority's assertion, the purpose the legislature had in providing the exemption in section 12 is not evident from the statement of the legislature's purpose in enacting the Franchise Disclosure Act. As noted above, the statute clearly indicates that it aims to provide Illinois franchisees with easy access to information about both the financial health of the franchisor *and* the terms and conditions of the franchise contract. (See, *e.g.*, Ill. Rev. Stat. 1977, ch. 121½, pars. 702, 705(18) through 705(21).) This policy is as relevant to franchisors with their shares listed on a national stock exchange as it is to the smaller, less well-capitalized franchisors, and it does not provide any meaningful guidance to the Attorney General on how to use the power to grant exemptions from the disclosure requirements "in the public interest."

The "public interest" exemption provided in section 12 fails to identify sufficiently the *persons* who may receive the exemption and the *harms* that it is intended to alleviate.

ate. It therefore violates the nondelegation doctrine and is unconstitutional and void.

III

In conclusion, I believe that the granting of an untrammeled power to the Attorney General to exempt certain persons from criminal liability violates equal protection and the nondelegation doctrine. The vague "public interest" standard for granting the exemptions creates too great a danger of arbitrary classification to uphold, especially when the personal liberty of the defendant may be at stake in a criminal proceeding. I would declare section 12 unconstitutional; and because it is an integral component of the criminal sanctions imposed under the Act, I would declare void all criminal sanctions that are subject to the exemption.

In the present case I would affirm the appellate court's conclusion that the convictions based on counts I, II and IV are void. For the reasons stated in Justice Moran's separate opinion, I would also affirm the appellate court's judgment which reversed the conviction based on count III.

APPENDIX B

Opinion of the Illinois Appellate Court in People v. Carter, 102 Ill.App.3d 796, 430 N.E.2d 31 (1st Dist. 1981).

FIFTH DIVISION
November 20, 1981

No. 80-1851

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. DALE M. CARTER, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY HONORABLE ROBERT J. COLLINS, PRESIDING.

Mr. JUSTICE LORENZ delivered the opinion of the court:

Defendant was sentenced to three years imprisonment after he was tried by jury and convicted of four counts of violating the Franchise Disclosure Act. (F.D.A. §§1, et seq., Ill. Rev. Stat. 1979, ch. 121 1/2, pars. 701, et seq.) Several questions are presented for review, but we find that this appeal must be resolved based upon our consideration of two fundamental issues: (1) whether counts 1, 2 and 4 are void because the statutory provisions upon which they are based delegate legislative authority without providing an intelligible statutory guideline as a limitation on the exercise of the delegated power; and (2) whether the evidence is sufficient to prove defendant guilty of count 3 beyond a reasonable doubt.

We reverse. The following facts are material to our decision.

Defendant was chairman of the board and shareholder in Pie Tree, Inc., a Pennsylvania corporation which was in the business of selling franchises for Pie Tree restaurants and bakeries. In February of 1978, Pie Tree's attorney, Elmer S. Beatty, Jr., sent an application to the Illinois Attorney General's Office to register the corporation under the Franchise Disclosure Act. This application was received on March 2, 1978.

Section 16 of the F.D.A. provides that a registration becomes effective 20 business days after receipt of the application, unless, within the 20 day review period, the Attorney General either denies the application outright or notifies "the franchisor or its representative that the materials filed do not meet the requirements

of [the] Act."

On March 8, 1978, the Attorney General sent notice that Pie Tree's application was unacceptable and that the 20 day review period would be tolled until Pie Tree submitted additional material. One of the 15 items specified in the "stop letter" was a requirement that Pie Tree submit an agreement which provided for the escrow of monies paid to Pie Tree by franchise purchasers.

The "stop letter" was sent to Beatty at his law office in Pittsburgh, Pennsylvania. The return receipt was signed by a "Diana Roll," "Roth," or "Rath." However, there is no direct evidence that Beatty received the letter or that he discussed with defendant any of the items requested by the Attorney General.

In June of 1978, defendant negotiated the sale of a Pie Tree franchise to Roger Collier for $45,000. This agreement authorized Collier to operate a Pie Tree restaurant in Illinois and obligated Pie Tree to provide Collier with a fully equipped restaurant.

Although Collier paid $43,000 to Pie Tree, the money was not placed in escrow, and before Collier received the promised restaurant, Pie Tree went bankrupt.

Count 1 accused defendant of failing to comply with the requirements of sections 4(1) and 16 of the F.D.A. by selling a franchise in Illinois without first having registered as a franchisor. Count 2 accused defendant of failing to comply with the requirements of section 4(2) by selling a franchise in Illinois without providing a disclosure statement to the purchaser. And count 4 accused defendant of failing to comply with the requirements of section 16.1 by selling a franchise in Illinois without first having registered each salesperson who represented the franchisor in this state.

Count 3 accused defendant of "engaging in an act, practice or course of business which acted as a fraud and deceipt [sic] upon Roger Collier, in violation of [F.D.A., §6(1)(c)] to wit: failing to place the franchise fee paid by Roger Collier in an escrow account as required by the Illinois Attorney General's Office."

Section 20, the crime defining provision of the F.D.A., makes it a Class 4 felony to sell a franchise in Illinois without

complying with sections 4, 6, 16 and 16.1. Even though section 20 creates a criminal law which is uniformly applicable to franchise sellers, section 12 of the F.D.A. authorizes the Attorney General to grant individual exemptions from sections 4 and 16, the underlying provisions upon which counts 1 and 2 of the indictment are based. However, this exemption power does not apply to section 6, and it does not expressly apply to section 16.1.

OPINION

I.

Defendant argues that the F.D.A. violates the constitutional guarantees of due process and equal protection because section 12, when read in conjunction with section 20, authorizes the Attorney General to grant individual exemptions from the obligations of an otherwise uniformly applicable criminal statute.

Defendant also argues that it violates the constitutional requirement of separation of powers (Ill. Const. 1970, Art. 2, sec. 1 and Art. 4, sec. 1) to authorize the Attorney General to, in effect, rewrite the provisions of an otherwise uniformly applicable criminal statute by granting prospective exemptions from that statute.

The separation of powers argument presents two questions. First, can the General Assembly ever delegate authority to grant prospective exemptions from an otherwise uniformly applicable criminal statute? We have been unable to find another case in which a legislature delegated such power to an executive officer or agency, but, "It is an established rule that the General Assembly cannot delegate its general legislative power to determine what the law shall be." (Hill v. Reyea (1966), 34 Ill.2d 552, 555, 216 N.E.2d 795.) Keeping this established rule in mind, compare the Attorney General's extraordinary power under sections 12 and 20 of the F.D.A. with the detailed procedures, including the check of the Governor's veto power, which the constitution requires the General Assembly to follow whenever it seeks, by amendment, to add an exemption to an already enacted statute. Ill. Const. 1970, Art. 4, secs. 7, 8 and 9.

Assuming that this exemption power is delegable, the second

question is whether the F.D.A. provides an adequate guideline or standard for use in limiting and reviewing the exercise of the delegated power. A delegation of legislative authority is an unconstitutional violation of the separation of powers if the delegated power is not limited by an intelligible statutory guideline or standard. (Hill v. Reyea, ibid.) We believe it is appropriate to consider the second question first because it presents the narrower issue of whether, in the context of section 20, section 12 of the F.D.A. contains an intelligible guideline as a limitation on the delegated power.

Section 12 provides that,

> "The [Attorney General] may by rule or order, and subject to such terms and conditions as he may prescribe, exempt any franchise, franchisor, subfranchisor, franchise broker, or salesperson from sections 4, [or] 16 *** of this Act if he finds that enforcement of this Act is not necessary in the public interest * * *."
> (Emphasis added.)

Thus the statutory "limitation" on the Attorney General's exemption power is his or her individual determination of what is "in the public interest." When read in conjunction with section 20, section 12 of the F.D.A. authorizes the Attorney General to grant individual exemptions from an otherwise uniformly applicable criminal law whenever he or she concludes that it is "in the public interest."

But, the General Assembly has already implicitly determined that it is always "in the public interest" to uniformly provide that it is a crime to fail to comply with the registration and disclosure requirements of the F.D.A. Since consistent application of these registration and disclosure requirements is an important means of protecting Illinois residents from substantial losses (F.D.A., §2), it is neither clear nor comprehensible why it would ever be "not in the public interest" to consistently apply the uniform criminal provisions of the F.D.A. as enacted by the General Assembly. It is, therefore, internally inconsistent for the F.D.A. to provide that the

Attorney General can rule that it would be "in the public interest" to grant exemptions from these otherwise consistently applicable criminal provisions. We therefore conclude that the phrase "in the public interest" is not an intelligible limitation on the exemption power in the context of an F.D.A. criminal prosecution. Consequently, when considered in conjunction with section 20, section 12 of the F.D.A. is an unconstitutional delegation of legislative power.

II.

As we already noted, section 12 expressly authorizes exemptions from sections 4 and 16, the provisions which form the underlying bases for counts 1 and 2. But before considering the extent to which the crime defining section 20 is severable from section 12, we must determine whether the exemption power indirectly applies to section 16.1, the provision upon which count 4 is based.

The first sentence of section 16.1 requires the registration of "franchise brokers" and of the salespersons who represent such "franchise brokers" in Illinois. There is no reference to section 16 in the first sentence of 16.1. However, the second sentence of section 16.1 requires a "franchisor" to register each salesperson who represents the franchisor in Illinois "by filing an application containing the information required by section 16 * * *." Thus the Attorney General's section 12 authority to grant exemptions from the requirements of section 16 indirectly includes authority to grant exemptions from the requirements of the second sentence of section 16.1.

Although the first sentence of section 16.1 imposes obligations solely on "franchise brokers," and the second sentence imposes obligations solely on "franchisors," count 4 does not specify, by numerical designation, whether it is based on an alleged violation of the first or second sentence. However, count 4 itself accuses defendant of violating section 16.1 by selling a franchise in Illinois "without first having registered each salesperson who represented the franchisor * * *" (emphasis added.) Furthermore there is no mention of "franchise broker" in count 4.

Because "franchise brokers" and "franchisors" are separate types of franchise sellers under the F.D.A. (§§3(3) and 3(22)), it

is clear that count 4 is based solely on an alleged failure to comply with the requirements of the second sentence of section 16.1. And as we already concluded, the section 12 authority to grant exemptions from section 16 indirectly includes authority to grant exemptions from the requirements of the second sentence of section 16.1.

III.

Next, we must consider whether section 12 is severable from the portions of section 20 upon which counts 1, 2 and 4 of the indictment are based. F.D.A. §39.

> "The settled and governing test of severability is whether the valid and invalid provisions of the Act are 'so mutually "connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently * * *".' [Citations omitted.] The provisions are not severable if 'they are essentially and inseparably connected in substance.'" Fiorito v. Jones (1968), 39 Ill. 2d 531, 540, 236 N.E.2d 698.

We recognize that the legislature is, as it should be, usually precise in defining the scope or applicability of the criminal laws which it enacts. However, in the case of the F.D.A. it is apparent that the General Assembly believed that the applicability of the statute, as enacted, was broader than it should be, and that it was, therefore, necessary to authorize the Attorney General to grant exemptions from the provisions of the Act. Therefore, we conclude that those portions of the crime defining provisions of the F.D.A. which are involved in this case are so closely connected with and dependent upon the unconstitutional exemption provision that they are inseparable; the legislature would not have passed one without the other. Specifically, we hold that section 20 of the F.D.A. is

invalid to the extent that it makes it a crime to fail to comply with sections 4 and 16 and the second sentence of section 16.1 of the F.D.A.

Since counts 1, 2 and 4 are based upon invalid portions of section 20, we conclude that these counts, and the convictions which are based upon them, are void. It should be noted, however, that our holdings on the unconstitutionality of section 12, and on the severability of section 20, are based on an analysis which views the exemption provision solely in the context of a criminal prosecution. We therefore express no opinion on the validity of section 12 in the context of a civil case.

The State notes that in People v. Vandiver (1972), 51 Ill. 2d 525, 529, 283 N.E.2d 681, the supreme court declined to consider a void-for-vagueness attack on the validity of a statute because the defendant's arguments were based on hypothetical situations which were not involved in that case. The supreme court stated that, "The hypothetical situations do not involve this defendant nor this case and the validity of the statute in light of the same will therefore not be considered." (Ibid 529.) But, unlike Vandiver, the unconstitutional feature of the statute under which defendant was prosecuted is pervasive. Moreover, the defendant in this case does not rely upon remote hypotheticals to support his attack on the F.D.A. Therefore, we conclude that the prudential rule of judicial self-restraint invoked in Vandiver is not applicable to the present case.

IV.

Section 6(1) (c) of the F.D.A. provides that,

> "It is unlawful for any person, in connection with the offer or sale of any franchise, to directly or indirectly * * * (c) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

Violation of section 6 is a crime, under section 20; but section 12 does not authorize the Attorney General to exempt franchise

sellers from the prohibitions on fraudulent practices which are established by section 6. Our holdings on the validity of the other counts of the indictment are, therefore, not controlling on the question of the validity of this count.

Count 3 accused defendant of violating section 6(1) (c) by "failing to place the franchise fee paid by Roger Collier in an escrow account as required by the Illinois Attorney General's Office." The State's theory of criminal liability under count 3 is that, although it might ordinarily be lawful under section 6 for a franchisor to fail to use an escrow, this omission became a felony because of the requirement in the "stop letter" that Pie Tree submit an escrow agreement.

Defendant initially argues that section 6(1) (c) is void-for-vagueness on the grounds that it does not give reasonable notice of what conduct is made criminal. Instead of defining what is meant when the terms "fraud" and "deceit" are used in section 6(1)(c), the definitions section of the F.D.A. merely exacerbates the vagueness by stating that, "'Fraud' and 'deceit' are not limited to common law fraud or deceit." F.D.A., §3(11).

However, we need not address the question of the constitutional validity of section 6 because we agree with one of defendant's alternative contentions: that the evidence is not sufficient to prove him guilty beyond a reasonable doubt.

The State does not dispute that, under its own theory of the case, it was obligated to prove beyond a reasonable doubt that defendant knew that the "stop letter" sent to Pie Tree's attorney required Pie Tree to submit an escrow agreement.

Although there was direct evidence, including Collier's testimony, that defendant knew Pie Tree's Illinois registration had not been approved at the time the franchise agreement with Collier was executed, there was no direct evidence to show that defendant knew about the demand that Pie Tree submit an escrow agreement. Instead, the State relied solely upon circumstantial evidence to prove this element of its case. This circumstantial evidence consisted of showing that the "stop letter" was sent to Pie Tree's

attorney, and on the fact that defendant knew the Illinois application had not been approved.

According to the State, "This evidence, coupled with Collier's testimony that defendant knew of the Illinois franchise application, is more than sufficient for the jury to infer that defendant knew full well the contents of the March 8, 1978, 'stop letter.'"

We disagree because this circumstantial evidence is not sufficient to exclude every reasonable hypothesis for the facts which is consistent with innocence.

Even if we infer that Beatty received the "stop letter" and informed defendant that more paperwork was needed on the Illinois application, Beatty did not testify at trial, and there is no way of knowing whether Beatty discussed,with defendant, all the contents of that letter. It is, of course, possible that Beatty discussed the escrow requirement with defendant. But it is equally possible that Beatty did not. We simply cannot conclude that this evidence of a mere possibility is sufficient to prove, beyond a reasonable doubt, that defendant knew about the Attorney General's escrow requirement. Consequently, we find that the evidence is not sufficient to prove defendant guilty of count 3 beyond a reasonable doubt.

For all the preceding reasons, defendant's conviction is reversed.

Reversed.

MEJDA and WILSON, JJ., concur.

APPENDIX C

Order of Illinois Supreme Court in People v. Carter denying rehearing on September 30, 1983.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

September 30, 1983

Mr. Donald Page Moore
35 E. Wacker Dr., S#2828
Chicago, IL 60601

No. 56106 - People State of Illinois, appellant, vs. Dale M. Carter, appellee. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Very truly yours,

Juleann Hornyak

Clerk of the Supreme Court

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

JULEANN HORNYAK
CLERK

TELEPHONE
AREA CODE 217
782-2035

October 21, 1983

Mr. Donald Page Moore
Attorney at Law
35 E. Wacker Dr., S#2828
Chicago, IL 60601

Hon. Neil F. Hartigan
Attorney General
500 S. Second St.
Springfield, IL 62706
Att'n: Donald Townsend

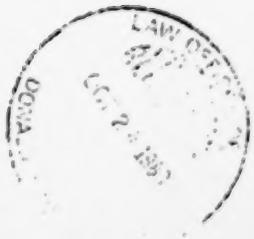
THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No. 56106 - People State of Illinois, appellant, vs. Dale M. Carter, appellee.

The motion by appellant for leave to file objections instanter is allowed, and the motion by appellee for stay of mandate pending review in the Supreme Court of the United States is allowed.

cc: Robert C. Goldberg
Jo Anne F. Wolfson

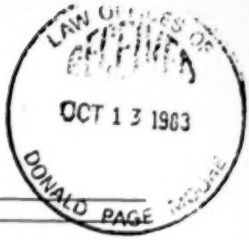
JH/dem



JULEANN HORNYAK, CLERK

APPENDIX D

Notice of Appeal by Appellant filed with Illinois Supreme Court on October 11, 1983.



NO. 56106

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 80-1851.
Plaintiff-Appellant,	)	
v.	)	There Heard on Appeal from the Circuit Court of Cook County, Criminal Division, No. 79 C 2158.
DALE M. CARTER,	)	
Defendant-Appellee.	)	Hon. Robert J. Collins, Judge Presiding.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Dale M. Carter, the Defendant-Appellee above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Illinois, affirming the judgment of conviction, entered herein on December 17, 1982, rehearing denied September 30, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DONALD PAGE MOORE
35 East Wacker Drive
Suite 2828
Chicago, IL 60601
312/641-1760

Donald Page Moore

Attorney for Dale M. Carter

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

CERTIFICATE OF SERVICE

I am a member of the Bar of the Supreme Court of the United States.

I certify that I caused a copy of the foregoing Notice of Appeal to the Supreme Court of the United States to be mailed, postage prepaid, to Donald Townsend, Asst. Attorney General, 500 S. Second Street, Springfield, IL 62706, this 7th day of October 1983. The above is the only party required by the rules of the Supreme Court of the United States or of this Court to be served.

Donald Page Moore

Subscribed and Sworn to
before me this 7th day
of October 1983.

Notary Public

APPENDIX E

Franchise Disclosure Act.

STATUTORY APPENDIX

FRANCHISE DISCLOSURE ACT

AN ACT relating to the sale of franchises; defining terms; providing for a full and fair disclosure of the nature of interests in franchises and for the regulation thereof; and fixing penalties for violations of this Act. P.A. 78–906, approved Sept. 21, 1973, eff. Jan. 1, 1974.

701. Short title

§ 1. Short title. This Act shall be known and may be cited as "The Franchise Disclosure Act".

702. Findings and purpose

§ 2. Findings and purpose. (1) The General Assembly finds and declares that the widespread sale of franchises is a relatively new business phenomenon which has created numerous problems in Illinois. Illinois residents have suffered substantial losses where the franchisor or his representative has not provided full and complete information regarding the franchisor-franchisee relationship, the details of the contract between the franchisor and franchisee, the prior business experience of the franchisor and other factors relevant to the franchise offered for sale.

(2) It is the intent of this Act: (a) to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered for sale; and (b) to protect the franchisee and the franchisor by providing a better understanding of the business and the legal relationship between the franchisor and the franchisee.

703. Definitions

§ 3. Definitions. As used in this Act:

(1) "Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between 2 or more persons by which:

(a) a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or serv-

ices, under a marketing plan or system prescribed or suggested in substantial part by a franchisor; and

(b) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

(c) the person granted the right to engage in such business is required to pay, directly or indirectly, a franchise fee of $100 or more;

Provided that this Act shall not apply to any franchised business which is operated by the franchisee on the premises of the franchisor or subfranchisor as long as such franchised business is incidental to the business conducted by the franchisor or subfranchisor at such premises, including, without limitation, leased departments and concessions.

(2) "Franchisee" means a person to whom a franchise is granted and includes a subfranchisor with regard to its relationship with a franchisor, unless stated otherwise in this Act.

(3) "Franchisor" means a person who grants a franchise and includes a subfranchisor with regard to its relationship with a franchisee, unless stated otherwise in this Act.

(4) "Area Franchise" means any contract or agreement between a franchisor and a subfranchisor whereby the subfranchisor is granted the right, in consideration of the payment of a franchise fee in whole or in part for such right, to sell or negotiate the sale of franchises in the name or on behalf of the franchisor. Where used in this Act, unless specifically stated otherwise, "franchise" includes "area franchise".

(5) "Subfranchisor" means a person to whom an area franchise is granted.

(6) "Order" means a consent, authorization, approval, prohibition, or requirement applicable to a specific case issued by the Attorney General.

(7) "Person" means an individual, corporation, a partnership, a joint venture, an association, a joint stock company, a trust, or an unincorporated organization.

(8) "Rule" means any published regulation or standard of general application issued by the Attorney General.

(9) "Sale" or "sell" includes every contract or agreement of sale of, contract to sell, or disposition of, a franchise or interest in a franchise for value.

(10) "State" means any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico.

(11) "Fraud" and "deceit" are not limited to common law fraud or deceit.

(12) "Offer" or "offer to sell" includes every attempt to offer to dispose of, or solicitation of an offer to buy, a franchise or interest in a franchise for value. The terms defined in this paragraph do not include the renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business by the franchisee.

(13) "Publish" means publicly to issue or circulate by newspaper, mail, radio, or television, or otherwise to disseminate to the public.

(14) "Franchise fee" means any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay directly or indirectly for the right to enter into a business or sell, resell, or distribute goods, services or franchises under an agreement, including, but not limited to, any such payment for goods or services, provided that the Administrator may by rule define what constitutes an indirect franchise fee, and provided further that the following shall not be considered the payment of a franchise fee: (a) the payment of a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring such credit card; (b) amounts paid to a trading stamp company by a person issuing trading stamps in connection with the retail sale of merchandise or services; (c) the purchase or agreement to purchase goods for which there is an established market at a bona fide wholesale price; or (d) the purchase or agreement to purchase goods for which there is an established market at a bona fide retail price subject to a bona fide commission or compensation plan.

The Administrator may by rule define what shall constitute an established market.

(15) "Disclosure statement" means the document provided for in Section 5 of this Act [1] and all amendments to such document.

(16) "Write" or "written" shall include printed, lithographed or any other means of graphic communication.

(17) "Advertisement" means any prospectus, circular, notice, advertisement, letter of communication, written or by radio or television, which offers any franchise for sale or confirms the sale of any franchise.

(18) "Affiliated company" means any company owned or controlled by a person to whom affiliation is attributed, any controlling parent company or controlled subsidiary of such person, any controlled subsidiary of a controlling parent company of such person and any other company or person owned or controlled by the same person or persons who own or control the person to whom affiliation is attributed.

(19) "Marketing plan" means a plan relating to some aspect of the conduct of a party to a contract in conducting business, including but not limited to (a) specification of price, or special pricing systems or discount plans, (b) use of particular sales or display equipment or merchandising devices, (c) use of specific sales techniques, (d) use of advertising or promotional materials or cooperation in advertising efforts; provided that an agreement is not a marketing plan solely because a manufacturer or distributor of goods reserves the right to occasionally require sale at a special reduced price which is advertised on the container or packaging material in which the product is regularly sold, if the reduced price is absorbed by the manufacturer or distributor.

(20) "Administrator" means the Illinois Attorney General.

(21)(a) A sale of a franchise is made in this state when an offer to sell is made in this state, or an offer to buy is accepted in this state, or, if the franchisee is domiciled in this state, the franchised business is or will be operated in this state.

(b) An offer to sell is made in this state when the offer either originates from this state or is directed by the offeror to this state and received at the place to which it is directed. An offer to sell is accepted in this state when acceptance is communicated to the offeror in this state; and acceptance is communicated to the offeror in this state when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed.

(c) An offer to sell is not made in this state merely because the franchisor circulates or there is circulated in this state an advertisement in (i) a bona fide newspaper or other publication of general, regular and paid circulation which has had more than two-thirds of its circulation outside this state during the past 12 months, or (ii) a radio or television program originating outside this state is received in this state.

(22) "Franchise broker" means any person engaged in the business of representing a franchisor or subfranchisor in offering for sale or selling a franchise and is not a franchisor or subfranchisor with respect to such franchise.

(23) "Salesperson" means any person, other than a franchise broker, representing a franchise broker, franchisor, or subfranchisor, whether as an employee, agent or independent contractor, in effecting or attempting to effect the offer or sale of a franchise.

Amended by P.A. 80–31, § 2, eff. June 30, 1977.

[1] Paragraph 705 of this chapter.

703.1. Jurisdiction and venue

§ 3.1. Jurisdiction and Venue. Any provision in a franchise agreement which designates jurisdiction or venue in a forum outside of Illinois is void with respect to any cause of action which otherwise is enforceable in Illinois.

Added by P.A. 81–417, § 1, eff. Jan. 1, 1980.

704. Prohibited practices

[redacted] It is unlawful for any franchise to be offered for sale or sold in this state by any person who is subject to this Act and is not first registered

pursuant to Section 16.1 [1] unless exempt from registration.

(2) It is unlawful for any person to offer or sell in this state any franchise which is subject to this Act without first providing to the prospective franchisee or subfranchisor, at least 7 days prior to the execution by the prospective franchisee or subfranchisor of any binding franchise or other agreement, or at least 7 days prior to the receipt by such person of any consideration, whichever occurs first, a copy of an effective disclosure statement registered with the Administrator meeting the requirements of this Act, together with a copy of all proposed agreements relating to the sale of a franchise.

Amended by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

[1] Paragraph 716.1 of this chapter.

704.1. Participation in trade associations

§ 4.1. Participation in trade associations. It shall be an unfair franchise practice and a violation of this Act for a franchisor or a subfranchisor to in any way restrict any franchisee from joining or participating in any trade association.

Added by P.A. 81–417, § 1, eff. Jan. 1, 1980.

704.2. Discrimination

§ 4.12. It shall be an unfair franchise practice and a violation of this Act for any franchisor or subfranchisor to unreasonably and materially discriminate between franchisees in the charges offered or made for franchise fees, royalties, goods, services, equipment, rentals or advertising services, unless and to the extent that any classification of or discrimination between franchisees is:

(a) based on franchises granted at materially different times, and such discrimination is reasonably related to such differences in time;

(b) related to one or more programs for making franchises available to persons with insufficient capital, training, business experience, education or lacking other qualifications;

(c) related to local or regional experimentation with or

variations in product or service lines or business formats or designs;

(d) related to efforts by one or more franchisees to cure deficiencies in the operation of franchise businesses or defaults in franchise agreements;

(e) lawful under 15 USC 13(b), (c), (d), (e), or (f); or

(f) based on other reasonable distinctions considering the purposes of this Act and is not arbitrary.

Added by P.A. 81–418, § 1, eff. Jan. 1, 1980.

704.3. Termination of Franchise

§ 4.1. Termination of Franchise. (a) It shall be a violation of this Act for a franchisor or subfranchisor to terminate a franchise prior to the expiration of its term except for "good cause" as provided in subsection (b) or (c).

(b) "Good cause" shall include, but not be limited to, the failure of the franchisee or subfranchisor to comply with any lawful provision of the franchise or other agreement and to cure such default after being given notice thereof and a reasonable opportunity to cure such default, which in no event need be more than 30 days.

(c) "Good cause" shall include, but without the requirement of notice and an opportunity to cure, situations in which the franchisee or subfranchisor:

(1) is adjudicated a bankrupt or insolvent;

(2) makes an assignment for the benefit of creditors or a similar disposition of the assets of the franchise business;

(3) voluntarily abandons the franchise business;

(4) is convicted of a felony or other crime which substantially impairs the good will associated with the franchisor's trademark, service mark, trade name or commercial symbol; or

(5) repeatedly fails to comply with the lawful provisions of the franchise or other agreement.

Added by P.A. 81–426, § 1, eff. Jan. 1, 1980.

704.4. Nonrenewal of a Franchise

§ 4.2. Nonrenewal of a Franchise. It shall be a viola-

tion of this Act for a franchisor or subfranchisor to fail or refuse to renew a franchise without compensating the franchisee or subfranchisor either by repurchase or by other means for the fair market value of the value of the franchise where:

(a) the franchisee is barred by the franchise agreement from continuing to conduct substantially the same business under another trademark, service mark, trade name or commercial symbol in the same area subsequent to the expiration of the franchise; or

(b) the franchisee or subfranchisor has not been sent notice of the franchisor's intent not to renew the franchise at least 6 months prior to the expiration date of the franchise.

Added by P.A. 81–426, § 1, eff. Jan. 1, 1980.

705. Contents of disclosure statement

§ 5. Contents of disclosure statement. The disclosure statement required by this section shall contain the following:

(1) the name of the franchisor, the name, trade name, and trademark and service mark under which the franchisor is doing or intends to do business, and the name of any affiliated company of the franchisor which the franchisor recommends or will recommend to franchisees as a supplier of goods or services or in connection with other business transactions of franchisees;

(2) the franchisor's principal business address and the name and address of its agent in this state authorized to receive process;

(3) the business form of the franchisor, whether corporate, partnership, or otherwise and the state or other sovereign power under which the franchisor is organized;

(4) the names of the directors or persons performing similar functions and names and addresses of the chief executive officer, and the financial, accounting, franchise sales, and other principal executive officers, if the franchisor is a corporation, association, or other entity, of all general partners, if the franchisor is a partnership, and of the franchisor, if the franchisor is an individual, together

with a statement of the business background during the past 5 years for each such person;

(5) a statement as to whether the franchisor or any person identified in the disclosure statement:

(i) has during the 5 year period immediately preceding the date of the disclosure statement been convicted of a felony, pleaded nolo contendere to a felony charge, or been held liable in a civil action by final judgment, if such felony or civil action involved fraud, embezzlement, or misappropriation of property, and a description thereof; or

(ii) is subject to any currently effective injunctive or restrictive order relating to the franchise offered as a result of a proceeding or pending action brought by any public agency or department, and a description thereof; or

(iii) is a defendant in any pending criminal or material civil action relating to fraud, embezzlement, misappropriation of property or violations of the antitrust or trade regulation laws of the United States or any state, and a description thereof; or

(iv) has during the 5 year period immediately preceding the date of the disclosure statement had entered against such person a final judgment in any material civil proceeding, and a description thereof; or

(v) is the franchisor or a principal executive officer or general partner of the franchisor and has during the 5 year period immediately preceding the date of the disclosure statement been adjudicated a bankrupt or reorganized due to insolvency or was a principal executive officer or general partner of any company that has been adjudicated a bankrupt or reorganized due to insolvency during such 5 year period, and a description thereof;

(6) the length of time the franchisor and any predecessor of the franchisor: (i) has conducted a business of the type to be conducted by the franchisees; (ii) has granted franchises for such business; and (iii) has granted franchises in other lines of business;

(7) a statement describing the trademarks, service marks, trade names and commercial symbols to be licensed to the franchisee as a part of the franchise, including: (i)

any registration of trademarks and service marks in the United States Patent and Trademark Office or this state; (ii) any pending interference, opposition or cancellation proceedings and any material judgments or pending litigation involving any such trademarks, service marks, trade names or commercial symbols; and (iii) any agreements currently in effect which significantly limit the rights of the franchisor with respect to any such trademarks, service marks, trade names or commercial symbols in any manner material to the franchise; a statement of the franchisor's obligations to protect all rights which the franchisee has to use such trademarks, service marks, trade names and commercial symbols and to protect the franchisee against claims of infringement and unfair competition;

(8) a financial statement of the franchisor audited by an independent certified public accountant, as of the close of the most recent fiscal year of the franchisor. If the financial statement is filed later than 120 days following the close of the fiscal year of the franchisor, it must be accompanied by a statement of the franchisor of any material changes in the financial condition of the franchisor. The Administrator may, in his discretion, waive the requirement for audited statements for franchisors, who have not previously had such certified audits, provided the unaudited financial statement is prepared by an independent certified public accountant. If the unaudited financial statement is filed later than 120 days following the close of the fiscal year of the franchisor, it must be accompanied by a statement of the franchisor of any material changes in the financial condition of the franchisor;

(9) a general description of the business which is the subject of the franchise, a description of the franchise, including without limitation a description of the goods, training programs, supervision, advertising, promotion and other services provided by the franchisor and a description of the method utilized and the responsibilities of the franchisor or the subfranchisor and the franchisee in determining the location and in acquiring the premises, if any, for the franchisee's business;

(10) a statement of the initial franchise fee charged, the proposed application of the proceeds of such fee by the franchisor and the formula by which the amount of such fee is determined if not uniform; a statement indicating whether and under what conditions all or part of the initial franchisee fee may be returned to the franchisee or subfranchisor; and a description of the estimated total investment required by the franchisor or subfranchisor to be made by the franchisee or subfranchisor, including without limitation, lease and installment purchase obligations;

(11) a description of all other franchise fees to be paid by the franchisee or subfranchisor and a statement describing any payments or fees other than franchise fees that the franchisee or subfranchisor is required to pay to the franchisor, including payments of fees which the franchisor collects in whole or in part on behalf of a third party or parties;

(12) a statement of whether the franchisee or subfranchisor is required to purchase from the franchisor of its designees services, supplies, products, fixtures, or other goods relating to the establishment or operation of the franchise business, together with a description thereof and a statement of whether and of the means by which the franchisor derives income from such purchases;

(13) a statement as to whether the franchisee is limited in the goods or services offered by it to its customers;

(14) a statement of the terms and conditions of any financing arrangements when offered directly or indirectly by the franchisor or his agent or affiliated company, including a description of any waiver of defenses or similar provisions in any note, contract or other instrument to be executed by the franchisee or subfranchisor; and a statement of any past or present practice or of any intent of the franchisor to sell, assign, or discount to a third party, in whole or in part, any note, contract or other instrument executed by the franchisee or subfranchisor containing any waiver of defenses or similar provisions;

(15) a copy of any statement of estimated or projected franchisee or subfranchisor sales or earnings prepared for presentation to prospective franchisees, subfranchisors or

other persons, together with a statement immediately following such statement setting forth the data upon which the estimations or projections are based;

(16) a statement of any compensation or other benefit given or promised to a public figure arising, in whole or in part, from (i) the use of the public figure in the name or symbol of the franchise or (ii) the endorsement or recommendation of the franchise by the public figure in advertisements;

(17) a statement of the number of franchise businesses presently being operated by franchisees and the number presently owned or being operated by the franchisor;

(18) a statement whether the franchisor requires the franchisee to participate personally in the direct operation of the franchise business;

(19) a statement as to whether franchisees are granted an area or territory within which the franchisor agrees not to operate or grant additional franchises for the operation of the franchise business or in which the franchisor will operate or grant franchises for the operation of no more than a specified number of additional franchise businesses;

(20) a statement of the conditions under which the franchise agreement may be terminated or renewal refused; a statement of the obligations of the franchisee upon termination or expiration of the franchise; a statement of the conditions and terms under which the franchise or the assets or ownership of the franchise business may be repurchased at the option of the franchisor or subfranchisor and of any right of first refusal or similar right which the franchisor or subfranchisor has to repurchase the franchise or the assets or ownership of the franchise business; and a statement of the conditions and terms under which the franchisee or subfranchisor is permitted to sell or otherwise transfer the franchise, or the assets or ownership of the franchise business, or interests therein;

(21) a statement explaining the terms and effects of any covenant not to compete which is or will be included in the franchise or other agreement to be executed by the franchisee or subfranchisor;

(22) a statement that the franchisor or subfranchisor on request will make available a list of the names, address, and telephone numbers of the ten geographically closest operating franchise businesses under franchise agreements with the franchisor or subfranchisor located in this state and to the extent that there are less than ten such franchise businesses located in this state, such list shall include at least 10 such franchise businesses located in this state and the nearest state or states to this state in which there are ten such franchise businesses; and if there are less than 10 such franchise businesses located in this state and all other states, such list shall identify all such franchise businesses and include a statement to that effect;

(23) a statement setting forth such additional information and such comments and explanations relative to the information contained in the disclosure statement as the franchisor may desire to present.

Amended by P.A. 79-1176, § 1, eff. Jan. 1, 1976.

705.1. Inspection, interview, or demonstration of franchised business—Restrictions

§ 5.1. Any existing franchisee or subfranchisor whose name is disclosed to a prospective franchisee or subfranchisor pursuant to paragraph 22 of Section 5 [1] may restrict inspection, interview, or demonstration of the franchised business or equipment to reasonable business hours which are mutually convenient.

Added by P.A. 79-1176, § 1, eff. Jan. 1, 1976.

[1] Paragraph 705 of this chapter.

705.2. Franchise Advisory Board

§ 5.2. There is created in the Office of the Attorney General a Franchise Advisory Board consisting of 9 members to be appointed as follows: The Attorney General shall appoint 6 members from the Franchise Industry and 3 members from the general public. In the appointment of the initial members, the Attorney General shall designate 3 persons to serve for one year, 3 to serve for 2 years and 3 to serve for 3 years from the third Monday in January of

the even numbered year in which the term commences. All members appointed thereafter shall be appointed for terms of 3 years, except where an appointment is made to fill a vacancy, in which case the appointment shall be for the remainder of the term of the position vacant. The Franchise Advisory Board from time to time shall make recommendations concerning the administration of this Act. Members of the Franchise Advisory Board shall serve without compensation but shall be reimbursed for actual and necessary expenses incurred in their official capacities. The Board shall select its own chairman, establish rules and procedures, and keep a record of matters transpiring at all meetings. The Board shall hold regular meetings at least 4 times each year and special meetings shall be held at the call of the Chairman or any 5 members of the Board. All matters coming before the Board shall be decided by a majority vote of those present at any meeting.
Added by P.A. 79–1176, § 1, eff. Jan. 1, 1976; Amended by P.A. 80–31, § 2, eff. June 30, 1977.

706. Fraudulent practices

§ 6. Fraudulent practices. (1) It is unlawful for any person, in connection with the offer or sale of any franchise, to directly or indirectly:

(a) Employ any device, scheme, or artifice to defraud;

(b) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading;

(c) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

(2) It is unlawful for any person to make or cause to be made any untrue statement of a material fact in any application, notice, or report filed with the Administrator or omit to state in any application, notice, or report any material fact, or fail to notify the Administrator of any material change in such application, notice, or report, as

required by this Act and the Rules and Regulations thereunder.

Amended by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

707. Disclosure statement for subfranchisors

§ 7. Disclosure statement for subfranchisors. When the disclosure statement is for a franchise offering by a subfranchisor, the disclosure statement shall include the information required by Section 5 [1] with respect to the subfranchisor instead of the franchisor; provided, however, that if the franchisee will be required to look to the franchisor from whom the subfranchisor acquired the right to grant franchises for the provision of goods, training programs, advertising, promotion, supervision, assistance in site selections or other services, the Administrator may in his discretion require the disclosure statement for such franchise offering to include part or all of the information required by Section 5 with respect to both the subfranchisor and the franchisor from whom the subfranchisor acquired the right to grant franchises. The disclosure statement which includes information of the franchisor and subfranchisor shall be verified by both the franchisor and subfranchisor.

Amended by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

[1] Paragraph 705 of this chapter.

708. Completeness and accuracy of statements

§ 8. Completeness and accuracy of statements. All statements required by Section 5 [1] to be included in the disclosure statement shall be free from any false or misleading statement of a material fact, shall not omit to state any material fact required to be stated or necessary to make the statements not misleading, and shall be accurate and complete as of the effective date thereof.

Amended by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

[1] Paragraph 705 of this chapter.

709. Verification of statements

§ 9. Verification of statements. The disclosure statement required by Section 4 [1] shall be dated, signed and verified by the franchisor or by the subfranchisor. Such

verifications shall be made by the president, vice president, or chief executive officer, if the franchisor or subfranchisor is a corporation, by a general partner, if the franchisor or subfranchisor is a partnership, and by the franchisor or subfranchisor, if an individual.

[1] Paragraph 704 of this chapter.

710. Form of statements and additional information

§ 10. Form of statements and additional information. The Administrator may by rule prescribe the form of statements. In addition to the information required by Section 5 [1] to be included in the disclosure statement, the Administrator may by rule or order require (a) that specified portions of the disclosure statement be emphasized by italics, bold face type or other means, (b) that earnings or sales projections or estimations be qualified by appropriate legend and (c) require the filing with the Administrator of such other information or documents as are necessary or appropriate in the public interest or for the protection of prospective franchisees or subfranchisors and may, but need not, require that such additional information or documents be furnished to prospective franchisees or subfranchisors as part of the disclosure statement. No portion of the disclosure statement shall be underscored, italicized or printed in larger or boider type than the balance of the statement unless the Administrator requires or permits it. Amended by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

[1] Paragraph 705 of this chapter.

711. Escrow of franchise fees—Surety bonds

§ 11. Escrow of franchise fees—Surety bonds. If the Administrator finds that a franchisor has failed to demonstrate that adequate financial arrangements have been made to fulfill obligations to provide real estate, improvements, equipment, inventory, training, or other items to be included in the establishment and opening of the franchise business being offered, the Administrator may by rule or order require the escrow or impound of franchise fees and other funds paid by the franchisee or subfranchisor until such obligations have been fulfilled, or, at the option of the franchisor, the furnishing of a surety bond as provided by

rule of the Administrator, if he finds that such requirement is necessary and appropriate to protect prospective franchisees or subfranchisors.

Amended by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

712. Exemptions from disclosure statement and registration requirements

§ 12. Exemptions from disclosure statement and registration requirements. The Administrator may by rule or order provide that any information required by Section 5 [1] to be included in the disclosure statement need not be included in respect of any class of franchises if he finds that the requirement of such information is inapplicable to such class and that disclosure fully adequate for the protection of prospective franchisees or subfranchisors is otherwise required to be included within the disclosure statement. The Administrator may [redacted] and subject to such terms and conditions as he may prescribe, [redacted] any franchise, franchisor, subfranchisor, franchise broker, or salesperson from Sections 4, 16 or 16.2 [2] of this Act [redacted] or (1) for the protection of any class of prospective franchisees or subfranchisors or (2) by reason of the investment involved or (3) because of the limited character of the offering. The disclosure statement required by Section 4 [3] need not be furnished to a franchisee or subfranchisor who has already been furnished with a copy of such disclosure statement in connection with a prior purchase of a franchise by such franchisee or subfranchisor, provided that no amendments have been made to such disclosure statement since it was furnished to such franchisee or subfranchisor.

Amended by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

[1] Paragraph 705 of this chapter.
[2] Paragraphs 704, 716 or 716.2 of this chapter.
[3] Paragraph 704 of this chapter.

713. Conformity with disclosure statements of other jurisdictions

§ 13. Conformity with disclosure statements of other jurisdictions. The Administrator, giving due regard to the

desirability of avoiding the burden of preparing duplicate disclosure statements and similar documents, may by rule or order deem to be in full or partial compliance with section 5 of this Act [1] any disclosure statement which complies with the requirements of any Federal law or administrative rule, or with the law of any other state, which requires substantially the same disclosures to prospective franchisees and subfranchisors as are required under this Act.

[1] Paragraph 705 of this chapter.

714. Effect of filing of disclosure statement

§ 14. Effect of filing of disclosure statement. The fact that a disclosure statement with respect to any franchise has been filed with the Administrator is not a finding by the Administrator that the disclosure statement is in any way true, accurate or complete in substance or on its face, or be held to mean that the Administrator has in any way passed upon the merits or given approval to such franchise. It is unlawful to make, or cause to be made, to any prospective franchisee or to any prospective subfranchisor any express or implied representation contrary to the foregoing or to advertise or represent that the Administrator approves of or recommends any franchise.

715. Amendments

§ 15. Amendments. Amendments shall be filed with the Administrator by a franchisor, subfranchisor or franchise broker upon the occurrence of and accurately and completely reflecting any material change in any facts required to be disclosed. The Administrator may by rule further define what shall constitute a material change in facts required to be disclosed. An amendment which does not pertain to a material change shall not affect the registration.

Amended by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

716. Filing requirements and registration

§ 16. Filing requirements and registration. No franchisor or subfranchisor may sell or offer to sell franchises

in this state unless such person shall file with the Administrator 2 copies of all disclosure statements, advertisements, franchise agreements and consent to service of process, if required, and file the name and address of each salesperson who represents the franchisor or subfranchisor in this state together with a statement relative to each such person containing the information required by subsections 5(i) through 5(iv) inclusive of Section 5.[1]

The registration of a franchise or amendment thereto shall become effective on the twentieth business day after the date of the filing of the required materials, unless prior thereto one of the following events has taken place: (1) The Administrator has entered an order suspending, terminating, prohibiting or denying the sale or registration of the franchise, franchise broker or salesperson; or (2) The Administrator has notified the franchisor or its representative that the materials filed do not meet the requirements of this Act, and the reasons therefor; or (3) The Administrator in his discretion upon written request of the franchisor, has granted acceleration so as to provide for an effective date prior to the twentieth business day.

Amended by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

[1] Paragraph 705 of this chapter.

716.1. Registration of franchise brokers and salespersons

§ 16.1. Registration of franchise brokers and salespersons. A franchise broker shall register under this Act by filing an application in a form prescribed by the Administrator and a consent to service of process, if required, and shall register, by filing with the Administrator, each salesperson who represents the franchise broker in this state, the information required by subsection 5(i) through 5(iv) inclusive to Section 5 [1] and such other information as the Administrator may by rule require. The franchisor or subfranchisor shall register each salesperson who represents the franchisor or subfranchisor in this state, by filing an application containing the information required by Section 16 and such other information as the Administrator may by rule require. The Administrator may prescribe

such rules governing the sale of a franchise by a franchise broker or salesperson including qualifications, conduct, suspension, termination, prohibition or denial of the registration of a franchise broker or salesperson.

Added by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

[1] Paragraph 705 of this chapter.

716.2. Period of effectiveness and renewal

§ 16.2. Period of effectiveness and renewal. The registration of a franchise and the disclosure statement used in connection therewith shall be effective for a period of one year from its effective date, unless the Administrator by rule or order prescribes a different period, and may be renewed for additional periods of one year each, unless the Administrator by rule or order prescribes a different period, by filing with the Administrator 2 copies of a current disclosure statement, franchise agreement and other documents required by this Act no later than 20 business days prior to the expiration of the previous registration, unless such period is waived by order of the Administrator. If no order suspending, terminating, prohibiting or denying the sale or registration of the franchise under this Act is in effect and the renewal documents comply with this Act, the registration of a franchise shall be renewed on the day following the date on which the effectiveness would have expired or at such earlier time as the Administrator determines. The registration of a franchise broker or salesperson shall be effective for a period of one year from the registration date, and may be renewed for periods of one year, unless the Administrator by rule or order prescribes a different period.

Added by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

717. Certain sales exempted

§ 17. Certain sales exempted. (1) The sale of a franchise by a franchisee, for its own account, is exempted from the provisions of Section 4 of this Act [1] if the sale is not effected by or through a franchisor or subfranchisor and if the franchisee delivers to the prospective purchaser

a written notice 10 days prior to the sale setting forth the fact (a) that a disclosure statement is or is not on file with the Administrator, (b) and if on file, indicating the date filed and advising the prospective purchaser of its right to acquire a copy of such statement from the Administrator. A sale is not effected by or through a franchisor or subfranchisor merely because a franchisor or subfranchisor has a right to approve or disapprove a different franchisee or subfranchisor or requires payment of a reasonable transfer fee, as defined by rule. (2) The extension or renewal of an existing franchise or the exchange or substitution of a modified or amended franchise agreement where there is no interruption in the operation of the franchise business by the franchisee is exempt from the provisions of Section 4.

Amended by P.A. 79-1176, § 1, eff. Jan. 1, 1976.

[1] Paragraph 704 of this chapter.

718. Enforcement

§ 18. Enforcement. (a) Suspension, termination, prohibition or denial of sales or registration. The Administrator may suspend, terminate, prohibit or deny the sales of any franchise or registration of any franchise, franchise broker or salesperson if it appears to him that: (1) there has been a failure to comply with any of the provisions of this Act or the rules or orders of the Administrator pertaining thereto; or (2) that the disclosure statement or any amendment thereto is incomplete or inaccurate in any material respect; or (3) that the disclosure statement or any amendment thereto includes any false or misleading statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading; or (4) that the sale of the franchise would constitute a misrepresentation, deceit or fraud upon prospective franchisees; or (5) that any person in this state is engaging in or about to engage in false, fraudulent or deceptive practices or any device, scheme, or artifice to defraud in connection with the offer or sale of the franchise; or (6) that any person identified in the disclosure statement or any person engaged in the offer or

sale of the franchise in this state has been convicted of an offense, subject to an order or civil judgment or is a defendant in a proceeding described in subsection (5) of Section 5[1] and the involvement of such person creates an unreasonable risk to prospective franchisees; or (7) that anything prohibited by this Act has been used in connection with the offer or sale of the franchise; or (8) that the financial condition of the franchisor affects or would affect the ability of the franchisor to fulfill obligations under the franchise or other agreement and the franchisor is unable or unwilling to comply with a rule or order of the Administrator issued under Section 11[2]; or (9) that the franchisor's enterprise or method of business includes or would include activities which are illegal where performed; or (10) that there are conditions affecting the soundness of the franchise so that the sale thereof would be fraudulent, inequitable or would work or tend to work a fraud upon prospective franchisees or subfranchisors; or (11) that an applicant has failed to diligently process its registration application with the Administrator.

In no case shall the Administrator, or any person designated by him, in the administration of this Act, incur any official or personal liability by issuing an order or other proceeding or by suspending, denying, prohibiting or terminating the registration of a franchise broker or salesperson, or by denying, suspending, terminating or prohibiting the registration of franchises, or prohibiting the sale of franchises, or by suspending or prohibiting any person from acting as a franchise broker or salesperson.

The Administrator may exercise any of the powers specified in Section 26 of this Act.[3]

(b) Injunction. The Administrator, with such assistance as he may from time to time request of the State's Attorneys in the several counties, may institute proceedings in the circuit court to prevent and restrain violations of this Act or of any rule or order prescribed or issued under this Act. In such a proceeding, the court shall determine whether a violation has been committed, and shall enter such judgment or decree as it considers necessary to remove the effects of any violation and to prevent such

violation from continuing or from being renewed in the future. The court, in its discretion, may exercise all powers necessary for this purpose, including, but not limited to, injunction, revocation, forfeiture or suspension of the charter, franchise, certificate of authority or privileges of any corporation, association, limited partnership or other business organization operating under the laws of this state, dissolution of domestic corporations or associations, suspension or termination of the right of foreign corporations or associations to do business in this state, restitution or payment of damages by a franchisor or subfranchisor to persons injured by violations of this Act, including without limitation an award of reasonable attorneys fees and costs.
Amended by P.A. 80–31, § 2, eff. June 30, 1977.

[1] Paragraph 705 of this chapter.
[2] Paragraph 711 of this chapter.
[3] Paragraph 726 of this chapter.

718.1. Hearings and notice of order suspending, terminating, prohibiting, or denying sales or registration

§ 18.1. Hearings and notice of order suspending, terminating, prohibiting or denying sales or registration. The Administrator may summarily issue an order prohibiting, suspending, terminating or denying the sale of a franchise or registration of a franchise, franchise broker or salesperson if such order is within the public interest and Section 18,[1] provided the Administrator shall promptly notify the person in writing of the entry of an order under this Act and of the reasons therefor and upon receipt of written request the matter will be set down for hearing to commence within 10 days after such receipt unless the franchisor, subfranchisor, franchise broker or salesperson consents to a later date. If a hearing is not requested within 15 days from the date of the order and none is ordered by the Administrator, the order will remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after notice and hearing, may modify or vacate the order or extend it until its final determination.
Added by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

[1] Paragraph 718 of this chapter.

719. Civil penalties

§ 19. Civil penalties. In lieu of any penalty provided pursuant to section 20 of this Act [1], and in addition to an action pursuant to subsection (b) of section 18 of this Act,[2] the Administrator may bring an action in the name and on behalf of the people of the state against any person, trustee, manager or other officer or agent of a corporation, or against a corporation, domestic or foreign, to recover a penalty in a sum not to exceed $10,000 for the doing in this state of any act herein declared illegal. The action must be brought within 2 years after the commission of the act upon which it is based.

Amended by P.A. 80–31, § 2, eff. June 30, 1977.

[1] Paragraph 720 of this chapter.

[2] Paragraph 718 of this chapter.

720. Criminal prosecution

§ 20. Criminal prosecution. Any person who willfully sells a franchise in this state without complying with Sections 4, 6, 16 or 16.1 of this Act [1] or who in a disclosure statement or an amendment thereto willfully makes any false or misleading statement of a material fact or willfully omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, commits a class 4 felony and upon conviction shall be subject to such punishment as provided by law. The Administrator with such assistance as he may from time to time request of the State's Attorneys in the several counties, shall investigate suspected criminal violations of this Act and shall commence and try all prosecutions under this Act. Prosecutions under this Act may be commenced by information or indictment. With respect to the commencement and trial of such prosecutions, the Administrator shall have all of the powers and duties vested by law in State's Attorneys with respect to criminal prosecutions generally. A prosecution for any offense under this Act must be commenced within 3 years after the commission thereof. Nothing in this Act limits the power of the state to punish any person for any conduct which constitutes a crime under any other statute.

Amended by P.A. 80–31, § 2, eff. June 30, 1977.

[1] Paragraphs 704, 706, 716 or 716.1 of this chapter.

721. Private civil actions

§ 21. Private civil actions. (1) Damages. Any franchisee or subfranchisor may bring an action for violation of this Act to recover damages sustained by reason of such violation against the franchisor, subfranchisor, franchise broker or salesperson or other person by or on behalf of whom such sale was made or who shall have participated or aided in any way in making such sale. Such franchisee or subfranchisor, if successful, shall also be entitled to the costs of the action including, without limitation, reasonable attorney's fees.

(2) Rescission. (a) Every sale of a franchise made in violation of this Act shall be voidable at the election of the franchisee or subfranchisor as provided in subsection (b) of this Section. The franchisor, subfranchisor, franchise broker, salesperson or other person on behalf of whom such sale was made or who shall have participated or aided in any way in making such sale shall be jointly and severally liable to such franchisee or subfranchisor for (1) the full amount paid, together with interest at the legal rate from the date of payment less any income received on the franchise and (2) reasonable attorney's fees.

(b) Notice of any election provided for in paragraph (a) of this Section shall be given by the franchisee or subfranchisor within 90 days after the franchisee or subfranchisor shall have knowledge of a violation of this Act to each person from whom recovery will be sought, by certified letter addressed to the person to be notified at such person's last known address with proper postage affixed, or by personal service;

(c) No franchisee or subfranchisor shall have any right or remedy under this Section who shall fail, within 15 days from the date of receipt thereof, to accept an offer to return the consideration paid or to repurchase the franchise purchased by such person. Every offer provided for in this Section shall be in writing, shall be delivered to the franchisee or subfranchisor or sent by certified mail addressed to the franchisee or subfranchisor at such person's last known address, shall offer to return any consideration paid or to repurchase the franchise for a price equal to the full

amount paid less any income received by the franchisee, plus the legal rate of interest thereon and may require the franchisee or subfranchisor to return to the person making such offer all unsold goods, equipment, fixtures, leases and similar items received. Such offer shall continue in force for 15 days from the date on which it was received by the franchisee or subfranchisor, shall advise the franchisee or subfranchisor of such rights and the period of time limited for acceptance thereof, and shall contain such further information, if any, as the Administrator may prescribe. Any agreement not to accept or refusing or waiving any such offer made during or prior to the expiration of said 15 days shall be void.

(d) The term "franchisee" or "subfranchisor" as used in this Section shall include the personal representative or representatives of the franchisee or subfranchisor.

(3) Every person who directly or indirectly controls a person liable under Section 21(1) and (2), every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions, every employee of a person so liable who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as such person, unless said person who otherwise is liable had no knowledge or reasonable basis to have knowledge of the facts, acts or transactions constituting the alleged violation.
Amended by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

722. Periods of limitation

§ 22. Periods of limitation. No action shall be maintained to enforce any liability created under this Act unless brought before the expiration of 3 years after the act or transaction constituting the violation, the expiration of one year after the discovery of the fact constituting the violation or 90 days after delivery to the franchisee or subfranchisor of a written notice disclosing the violation. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act. Every cause

of action under this Act survives the death of any person who might have been a plaintiff or defendant.

723. No other civil liability

§ 23. No other civil liability. Except as explicitly provided in this Act, no civil liability in favor of any person shall arise against any person by implication from or as a result of the violation of any provision of this Act. Nothing in this Act shall limit any liability which may exist by virtue of any other statute or under common law if this Act were not in effect. Prior law exclusively governs all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before the effective date of this Act.

724. Certificates of non-compliance; admissibility in evidence

§ 24. Certificates of non-compliance; Admissibility in evidence. In any civil or criminal action brought under this Act, a certificate under the seal of State, signed by the Administrator, stating non-compliance with the provisions of this Act, shall constitute prima facie evidence of such non-compliance with the provisions of this Act and shall be admissible in any such action. Such certificate of non-compliance shall be furnished by the Administrator upon application therefor and the payment of a certification fee of $2.

Amended by P.A. 79–1176, § 1, eff. Jan. 1, 1976.

725. Advertising

§ 25. Advertising. No person may publish, distribute or use in this state any advertisement offering to sell or to purchase a franchise unless 2 true copies of the advertisement have been filed in the office of the Administrator at least 5 days prior to the first publication, distribution or use thereof or such shorter period as the Administrator by rule or order may allow, or unless the advertisement has been exempted from this section by rule of the Administrator. The Administrator may by rule or order prohibit the use of advertising deemed false, fraudulent, misleading or deceptive.

726. Powers of the Administrator

§ 26. Powers of the Administrator. (a) Investigations. The Administrator may in his discretion: (1) make such public or private investigations inside or outside this state as he deems necessary (i) to determine whether any person has violated, is violating, or is about to violate any provision of this Act or any rule or order prescribed or issued under this Act or (ii) to aid in the enforcement of this Act or in the prescribing of rules under this Act; and (2) publish information concerning the violation of this Act or any rule or order prescribed or issued under this Act. No actions taken or orders issued by the Administrator shall be binding on, nor in any way preclude the Administrator from conducting any investigation or commencing any action authorized under this Act. The Secretary of State shall turn over custody of all notices, orders and files to the Attorney General upon the effective date of this amendatory Act. The Administrator or any of his Assistants may participate in any hearings conducted by the Administrator under this Act and the Administrator may provide such assistance as the Administrator believes necessary to effectively fulfill the purposes of this Act.

(b) Subpoenas. For the purpose of any investigation or proceeding under this Act and prior to the commencement of any civil or criminal action as provided for in this Act, the Administrator has the authority to subpoena witnesses, compel their attendance, examine them under oath, or require the production of any books, documents, records, tangible things, hereafter referred to as "documentary material," which the Administrator deems relevant or material to his investigation, for inspection, reproducing or copying under such terms and conditions as are hereafter set forth. Any subpoena issued by the Administrator shall contain the following information: (1) the statute and section thereof, the alleged violation of which is under investigation; (2) the date, place and time at which the person is required to appear or produce documentary material in his possession, custody or control at a designated office of the Administrator, which date shall not be less than 10 days from date of service of the subpoena; and (3)

where documentary material is required to be produced, the same shall be prescribed by class so as to clearly indicate the material demanded.

(c) Production of documentary material. The Administrator is hereby authorized, and may so elect, to require the production, pursuant to this section, of documentary material prior to the taking of any testimony of the person subpoenaed, in which event such documentary material shall be made available for inspection and copying during normal business hours at the principal place of business of the person served, or at such other time and place as may be agreed upon by the person served and the Administrator. When documentary material is demanded by subpoena, said subpoena shall not (1) contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state; or (2) require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state.

(d) Service of subpoenas. Service of a subpoena of the Administrator as provided herein may be made by (1) delivery of a duly executed copy thereof to the person served, or if a person is not a natural person, to the principal place of business of the person to be served, or (2) mailing by certified mail, return receipt requested, a duly executed copy thereof addressed to the person to be served at his principal place of business in this state, or, if said person has no place of business in the state, to his principal office.

(e) Examination of witnesses. The examination of all witnesses under this section shall be conducted by the Administrator or by his deputy designated by him before an officer authorized to administer oaths in this state. The testimony shall be taken stenographically or by a sound recording device and shall be transcribed.

(f) Fees. All persons served with a subpoena by the Administrator under this Act shall be paid the same fees and mileage as are paid to witnesses in the courts of this state.

(g) Judicial enforcement of subpoenas. In the event a witness served with a subpoena by the Administrator under this Act fails or refuses to obey same or to produce documentary material as provided herein or to give testimony relevant or material to the investigation being conducted, the Administrator may petition any circuit court for an order requiring said witness to attend and testify or produce the documentary material demanded. Thereafter, any failure or refusal on the part of the witness to obey such order of court may be punishable by the court as a contempt thereof.

(h) Immunity from prosecution. No person is excused from attending and testifying or from producing any document or records before the Administrator in obedience to the subpoena of the Administrator, in any proceeding instituted by the Administrator and authorized by this Act, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture. No individual may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after validly claiming his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed in testifying.

(i) Administrator entitled to recover costs. In any action brought under the provisions of this Act, the Administrator is entitled to recover costs for the use of the state.

Amended by P.A. 80–31, § 2, eff. June 30, 1977.

727. Rules and interpretive opinions

§ 27. Rules and interpretive opinions. The Administrator may make and enforce such reasonable rules as are necessary to administer and enforce this Act. Such rules and regulations shall conform to and comply with "An Act concerning administrative rules", approved June 14, 1951, as amended.[1] The Administrator may in his discretion honor requests for interpretive opinions.

[1] Chapter 127, ¶ 263 et seq. (repealed).

728. Hearings

§ 28. Hearings. (a) Notice required. If a hearing is requested or ordered under any provision of this Act, the Administrator shall set the matter for hearing and notice of the time and place for the hearing shall be sent to the franchisor or subfranchisor, at least 7 days prior to the hearing.

(b) Manner of giving notice. Notice required by this section is sufficient if sent by registered or certified mail and addressed to the franchisor or subfranchisor at the address designated in the disclosure statement.

(c) Opportunity to be present and heard. The parties to any hearing shall be accorded ample opportunity to present, in person or by counsel, such statements, testimony, evidence and argument as may be pertinent.

(d) Record. All testimony taken at any hearing before the Administrator shall be reported stenographically or by a sound recording device and a full and complete record shall be kept of all proceedings.

(e) Written decisions required. After a hearing, the Administrator shall issue a written decision modifying, vacating or extending the order and shall state the reasons for his decision.

729. Review under Administrative Review Act

§ 29. Review under Administrative Review Act. All final administrative decisions of the Administrator hereunder shall be subject to judicial review pursuant to the "Administrative Review Act", approved May 8, 1945, as amended,[1] and any rules adopted pursuant thereto. The term "administrative review" is defined as in Section 1 of the "Administrative Review Act".[2]

[1] Chapter 110, ¶ 264 et seq.
[2] Chapter 110, ¶ 264.

730. Service of process

§ 30. Service of process. Sufficient service of any process in any action brought under this Act may be made by serving a copy thereof with the agent designated to

receive process in the disclosure statement filed with the Administrator or in the absence of such agent at the principal business address set forth in the disclosure statement. Where no disclosure statement has been filed and personal jurisdiction cannot otherwise be obtained in this state over a person who engages in conduct prohibited or made actionable by this Act or any rule or order hereunder, that conduct shall be considered equivalent to the appointment of the Secretary of State to be such person's attorney to receive notice of any lawful process in any non-criminal suit, action or proceeding against him or his successor, executor, or administrator which grows out of that conduct and which is brought under this Act or any rule or order hereunder, with the same force and validity as if served on him personally. Service may be made by leaving a copy of the process in the office of the Secretary of State, but it is not effective unless (a) the plaintiff forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at his last known address or takes other steps which are reasonably calculated to give actual notice and (b) the plaintiff's affidavit of compliance with this section is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

731. Books and records

§ 31. Books and records. Every franchisor or subfranchisor selling franchises in this state shall at all times keep and maintain a complete set of books, records and accounts of such sales.

732. Public inspection

§ 32. Public inspection. (a) Generally. All disclosure statements and other papers and documents received by the Administrator under this Act shall be open to public inspection, except that the Administrator may, in his discretion, withhold from public inspection any information the disclosure of which is, in the judgment of the Administrator, not necessary in the public interest or for the protection of franchisees or subfranchisors. The Adminis-

trator may publish any information filed with him or obtained by him, if in the judgment of the Administrator, such action is in the public interest. No provision of this Act authorizes the Administrator or any of his assistants, clerks or deputies to disclose any information withheld from public inspection except among themselves or when necessary or appropriate in a proceeding or investigation under this Act or to other federal or state regulatory agencies. No provision of this Act either creates or derogates from any privilege which exists at common law or otherwise when documentary or other evidence is sought under a subpoena directed to the Administrator or any of his assistants, clerks or deputies.

(b) Restrictions on use. The Administrator and his employees may not use for personal benefit any information which is obtained by them under this Act and which is not then generally available to the public.

Amended by P.A. 80–31, § 2, eff. June 30, 1977.

733. Copies to be furnished

§ 33. Copies to be furnished. On request and at such reasonable charges as he prescribes by rule, the Administrator shall furnish to any person photostatic or other copies, certified under his seal of office if requested, of any document which is retained as a matter of public record. He shall not charge or collect any fee for copies of any document furnished to public officers for use in their official capacity. In any judicial proceeding or prosecution, any copy so certified is prima facie evidence of the contents of the document certified.

734. Destruction of records

§ 34. Destruction of records. (a) Period of retention. The Administrator may destroy any disclosure statements or orders, together with the files and folders, as useless or obsolete, four years after the date of receipt or issuance. A permanent record shall be maintained of any civil or criminal enforcement of this Act by the Administrator.

(b) Microfilm. Copies on microfilm or in other form which may be retained by the Administrator in his discre-

tion of any records destroyed under authority of this section shall be accepted for all purposes as equivalent to the original when certified by the Administrator.

735. Fees

§ 35. Fees. (a) The Administrator shall charge and collect the fees fixed by this Section. All fees and charges collected under this section shall be transmitted to the State Treasurer at least weekly, accompanied by a detailed statement thereof.

(b) The fee for the initial registration of a franchise shall be $500.

(c) The fee for filing an amended disclosure statement shall be $100 if the amendment pertains to a material change, otherwise $25.

(d) The fee for filing a renewal of a registration of a franchise shall be $250.

(e) The fee for an interpretative opinion shall be $50.

(f) The fee for registration of a franchise broker shall be $100 with a renewal fee of $100.

Amended by P.A. 79-1176, § 1, eff. Jan. 1, 1976.

736. Waivers void

§ 36. Waivers void. Any condition, stipulation or provisions purporting to bind any person acquiring any franchise to waive compliance with any provision of this Act is void.

737. Burden of proof

§ 37. Burden of proof. In any proceeding under this Act, the burden of proving an exemption or an exception from a definition is upon the person claiming it.

738. Construction

§ 38. Construction. This Act shall be liberally construed to effect the purposes thereof.

739. Severability

§ 39. Severability. If any provision of this Act or the application thereof to any person or circumstances is held

invalid, the invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provisions or application, and to this end the provisions of this Act are declared to be severable.

740. Effective date

§ 40. Effective date. This Act shall take effect on January 1, 1974.

APPENDIX F

Illinois Attorney General Rules
and Regulations Under The Franchise
Disclosure Act

REGULATORY APPENDIX

General Rules and Regulations Under The Franchise Disclosure Act

As Amended Through January 1, 1976

RULES AND REGULATIONS

Under the Franchise Disclosure Act
As Amended Through January 1, 1976

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ARTICLE 1

DEFINITIONS

Rule 100. The "Act" means The Franchise Disclosure Act, Ill. Rev. Stats., Chap. 121 1/2, Sec. 701-740; hereinafter cited Sec. 1-Sec. 40.

Rule 101. "Disclosure Statement" means the current draft of the Uniform Franchise Offering Circular. The requirements contained therein must be followed except as modified by rule, statement of policy or order of the Attorney General.

Rule 102. A marketing plan or system may be "prescribed or suggested in substantial part by a franchisor" within the meaning of Sec. 3.(1)(a), if the franchise or other agreement, the nature of the franchise business or other circumstances permits, suggests or requires the franchisee to follow an operating plan or standard operating procedures (or their substantial equivalent) promulgated by or for the franchisor. An operating plan or standard operating procedures may take the form of required or suggested procedures, prohibitions against certain business practices or a combination of both.

Examples of such a plan or procedure include but are not limited to: site selection; construction remodeling and decorating business premises; fixtures, equipment and signs utilized in the conduct of business; standards, dress and training programs for employees; hours of operation; limitations on products or services which the business may sell; quality and uniformity of products or services sold by the business; advertising; pricing and credit practices; customer relations; warranties to customers; and other requirements intended to produce a uniform or "chain" image.

While any one of the requirements which have been, or many others which could be mentioned, may not amount to "a marketing plan or system prescribed or suggested in substantial part by a franchisor", several such restrictions taken together may be sufficient to amount to such a plan or system.

Furthermore, a marketing plan or system may be determined to be prescribed or suggested in substantial part by a franchisor without regard to whether the franchisee is an independent contractor and not the agent of the franchisor and notwithstanding provisions of a franchise or other agreement purporting to grant the franchisee complete freedom in operating its business.

Rule 103. A franchisee's business is "substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate" within the meaning of Sec. 3.(1)(b), if the franchise or other agreement, the nature of the franchise business or other circumstances permits or requires the franchisee to identify its business to its customers primarily under such trademark, service mark, trade name, logotype, advertising or other commercial symbol (hereinafter referred to collectively as the "franchisor's mark") or to otherwise use the franchisor's mark in a manner likely to convey to the public that it is an outlet of the franchisor.

Rule 104. "Franchise Fee within the meaning of Sec. 3.(14) includes any fee or charge which the franchisee is required to pay to the franchisor or an affiliate of the franchisor for the right granted to the franchisee to engage in the franchise business regardless of the designation given to or the form of the fee or charge or whether payable in lump sum or installments, definite or indefinite in amount, or partly or wholly contingent on future sales, profits or purchases of the franchise business or other factors.

Rule 105. An "indirect franchise fee" within the meaning of Sec. 3.(14) includes, but is not limited to, an element of the price or rent charged for equipment, real estate, raw materials or services which the franchisee is required by agreement to buy or lease from the franchisor, an affiliated company of the franchisor or an unaffiliated company who pays any consideration to the franchisor or an affiliate.

Goods which are sold at a bona fide wholesale or retail price but must be purchased at a specified volume from the franchisor or an affiliated company of the franchisor may also include the payment of an indirect franchise fee if the purchase requirement is unrelated to relevant supply and demand factors, such as consumer demand, transportation, location of existing suppliers, seasonal variations, availability of alternative suppliers, etc.

Rule 106. "Bona fide wholesale price" and "bona fide retail price subject to a bona fide commission or compensation plan" within the meaning of Sec. 3.(14)(c) and (d) refer to a price which constitutes a fair payment for goods purchased at a comparable level of distribution and no part of which constitutes a payment for the right to enter into the franchise

business. Goods sold at a bona fide wholesale price include goods sold to the franchisee for resale. Goods sold or consigned at a bona fide retail price subject to a bona fide commission or compensation plan are generally goods which the franchisee will resell. The price charged for a trademarked product does not exceed its bona fide wholesale price merely because that price exceeds the wholesale price of non-trademarked products of comparable quality and specifications. If the trademarked product commands a premium price by virtue of the trademark it carries, such premium does not constitute the payment of a franchise fee. Services, rental payments, and leases of real or personal property are not within the category of "goods" regardless of whether the payment for such services or property constitutes a fair payment for comparable services or property. Payments for services and property are presumed to be in part for the right granted to the franchisee to engage in the franchise business. Ideas and instruction, training and other programs are services and not goods regardless of whether offered, distributed or communicated by word of mouth through instructions or lectures, in written or printed form or by record or tape recording, or any combination thereof.

Rule 107. "Established market" within the meaning of Sec. 3.(14) is a question of fact to be determined by the presence, among other factors, of the following:

(a) A number of presently existing wholesale and retail outlets of the seller or competitors in a similar line of business;

(b) The quantity and price of like or similar products presently sold in an existing geographical area in Illinois or other areas with similar market characteristics;

(c) The ability of the purchaser to resell at the suggested retail price of the manufacturer and/or wholesaler or at a reasonable mark-up over purchaser's cost.

Rule 108. The term "material change" as used in Sec. 15. of the Act, shall include any fact, circumstance, or condition which would have a substantial likelihood of influencing a reasonable prospective franchisee in the making of a decision relating to the purchase of a franchise. Such material changes include, but are not limited to the following:

(a) The termination, closing, failure to renew or repurchase of a significant number of franchises, which may depend on the number of franchises in existence and whether the area in which the above occurred is the same area in which new franchises will be offered.

(b) A change in any franchise or other fee charged by the franchisor.

Rule 109. "Manually signed consent of accountant" as referenced in the instructions to the Uniform Franchise Registration Application is not the report referred to in Rule 113. The consent should contain substantially the following language:

> John Doe and Company, Inc. hereby consents to the use in the Uniform Franchise Offering Circular filed by John Smith, Inc. of our report dated April 4, 1978, relating to the financial statements of John Smith, Inc. for the period ending December 31, 1977.

Rule 110. A person is "engaged in the business of representing a franchisor or subfranchisor" and is a franchise broker within the meaning of Sec. 5.(22) if such person is not an officer, director, partner, employee or an affiliated company of the franchisor.

Rule 111. "Franchise agreement" means any contract relating to the offer or sale of a franchise which includes, but is not limited to, a memorandum between the parties, lease, sub-lease and preliminary license or franchise agreement.

Rule 112. The term "correspondent" means the person authorized in the application for registration to receive notices and communications.

All persons signing an application for registration shall be deemed, in the absence of a statement to the contrary, to confer upon the applicant, and upon the correspondent named in the application for registration, the following powers:

(a) A power to amend the application for registration:
(1) by altering the date of the proposed offering;
(2) by filing any required written consent; or
(3) by correcting typographical errors;

(b) A power to make application for the Attorney General's consent to the filing of an amendment;

(c) A power to withdraw the application for registration or any amendment or exhibit thereto;

(d) A power to consent to the entry of an order under Sec. 18. of the Act, waiving notice and hearing, such order being entered without prejudice to the right of the applicant, thereafter to have the order vacated upon a showing to the Attorney General that the application for registration as amended is no longer incomplete or inaccurate on its face in any material respect.

Rule 113. The term "financial statement" means a balance sheet and profit and loss statement both certified to and prepared by an independent certified public accountant and a report of such accountant. The report shall contain an opinion which shall state:

(a) Whether the audit was made in accordance with generally accepted auditing standards;

(b) Whether any normal auditing procedures have been omitted and the reasons for their omission;

(c) Any matters to which the accountant takes exception and, to the extent practicable, the effect of each exception on the related financial statements.

Nothing in this Rule shall be construed to imply authority for the omission of any procedure ordinarily employed in the course of an audit or for the omission of any item usually stated in the opinion. A certified public accountant will not be considered independent if such accountant has a financial interest, directly or indirectly, with the franchisor or subfranchisor or has during the period of the report acted as a salesperson, franchise broker, officer, director or employee with respect to such franchisor or subfranchisor.

Rule 114. "Administrator" as used in these rules means the Attorney General of Illinois.

ARTICLE 2

OFFICE OF THE ATTORNEY GENERAL

Rule 200. Mailing Address of Franchise Section. The address of the Franchise Section is: Franchise Division, Office of the Attorney General, 500 South Second Street, Springfield, Illinois 62706.

Rule 201. Conferences. Conferences with the Administrator or a staff member relating to the Act may be made by appointment or by telephone: 217/782-4465.

Rule 202. Notification of Registration. The franchisor, subfranchisor, or franchise broker shall be notified by letter of registration after the examination process is complete.

Rule 203. Business hours of the Attorney General. The principal office of the Attorney General: Office of the Attorney General, 500 South Second Street, Springfield, Illinois 62706, daily, except Saturdays, Sundays and holidays, from 9:00 a.m. to 4:30 p.m., C.S.T. or C.D.S.T.

Rule 204. Period of Registration. The Attorney General may revise the period of registration within the meaning of Sec. 16.2 to coincide with the date financial statements are available, to permit staggered periods of registration or to coincide with the period of registration in another jurisdiction.

Rule 205. Interpretive Opinions. The Attorney General may issue an opinion at the request of the applicant provided the request is deemed to be within the public interest and the requisite filing fee is submitted. If the determination involves a question of fact, the documents necessary to resolve the question should be submitted, which may include a copy of the agreement, photographs of an existing location and promotional materials.

Rule 206. Order of Exemption. Since the request for such an Order necessitates an interpretive opinion, the applicant must submit the following:

(a) The requisite fee, see Sec. 35. (e);

(b) A narrative citing the basis for the exemption by specific reference to the Act, describing briefly the history of the entity or person and business of the proposed franchise, the initial investment and the franchise fees, stating the proposed number of sales within a twelve month period and whether the proposed sales involve the sale of an area franchise;

(c) Verification of the narrative by an appropriate individual, partner or corporation official;

(d) Copy of the agreement;

(e) Copy of the promotional materials.

The Attorney General will review the documents submitted, notify the applicant if additional information is necessary, notify the applicant if the request has no statutory basis or if the Order would not be permitted as a matter of applicable federal law or rule, or enter an order of exemption.

In determining whether to grant an exemption under Section 12 of the Act, [redacted] such of the following factors which are deemed relevant in the circumstances of the proposed transaction: [redacted] The net worth and financial condition of the buyer; [redacted] whether the buyer has prior experience relating to the franchise as a franchisee, a manager of a franchised outlet owned or operated by the franchisor or otherwise as an employee or agent of the franchisor; [redacted] whether the franchisee is represented by counsel; and [redacted] the amount of the investment to be made by the franchisee.

Rule 207. Exemption by Rule.

(a) The Attorney General has determined that if the offer of a franchise, which was or is registered in Illinois pursuant to Sec. 16., originates in Illinois, the documents required by Sec. 4. need not be delivered to a prospective franchisee who is not a resident of Illinois and resides in a jurisdiction which requires by statute prior to sale delivery of the Uniform Franchise Offering Circular or the substantial equivalent thereof to the prospective franchisee, provided the franchisor or subfranchisor complies with such a statute.

(b) The Attorney General has determined that if the offer of a franchise, registered in Illinois, originates in Illinois, a franchisor, subfranchisor, franchise broker or salesperson need not deliver the Uniform Franchise Offering Circular to a prospective franchisee that resides in a jurisdiction outside of the United States of America.

(c) The Attorney General has determined that the offer or sale of a franchise to a bank, savings institution, trust company, interstate carrier or insurance company is exempt from Sec. 4. and 16.

ARTICLE 3

REGISTRATION OF THE FRANCHISE

Rule 300. Number of registrations. The franchisor or subfranchisor must make a separate filing for each franchise to be registered, except that the Attorney General may register multiple franchises in one filing provided the following are present:

(a) the franchises will be offered concurrently;

(b) the franchises are of a similar type;

(c) the contractual obligations are similar;

(d) the information can be presented in a nonconfusing manner.

Rule 301. Number of documents to file. When corresponding with the Attorney General each document required to be filed must be submitted in duplicate. If a document to be filed is revised, updated, or amended, then an additional copy of such document or the revised pages therein must be submitted with the revised, updated or amended language designated by red underlining.

Rule 302. Documents to file. Pursuant to the provisions of Sec. 10. of the Act, the Attorney General has adopted the Uniform Franchise Registration Application, Uniform Franchise Offering Circular and other forms. There is no alternative method for complying with the Act.

The documents to be filed include:

(a) Uniform Franchise Registration Application;

(b) Supplemental Information page(s);

(c) Cross Reference Sheet;

(d) Advertisements or promotional materials;

(e) Salesmen Disclosure Form;

(f) Uniform Consent to Service of Process, unless exempted by the Act;

(g) Uniform Franchise Offering Circular which includes outside front cover, table of contents, the body with financial statements, projections or estimates if any, franchise agreement and receipt;

(h) Corporate, Individual, or Partnership Acknowledgment;

(i) Certification page.

Nothing contained in this Rule is to be construed as a limit to additional disclosure which may be deemed necessary by the Attorney General after examination. The instructions contained in the uniform forms are to be adhered to, except as noted in these Rules or statement of policy.

Rule 303. Preparation of Documents and Forms. Many of the documents noted in Rule 302 are available from the Attorney General including instructions and an outline for preparing the Uniform Franchise Offering Circular. The disclosure

required by the outline incorporates the requirements of Sec. 5. and 10. of the Act. When drafting a narrative response to the required disclosure, such response shall be stated simply, in a form understandable by a person unfamiliar with the franchise business and shall not incorporate by reference or reproduce provisions of the franchise or other agreements, but may refer to such provisions for a more thorough understanding.

Rule 304. Verification of Documents. The required documents are to be verified within the meaning of Sec. 9. of the Act by execution of the prescribed certification page.

Rule 305. Demonstration of Financial Capability. If, after examination of the financial statements of the franchisor required by Sec. 5. (8) of the Act and the duties and obligations of the franchisor contained in the franchise agreements submitted pursuant to Sec. 16. of the Act, the Attorney General determines that adequate financial resources are not available to the franchisor for the performance of said obligations, he may require any of the following:

(a) Escrow of funds: Pursuant to the powers granted in Sec. 11. of the Act, the Attorney General may require that the franchise fee be escrowed. The escrow agreement, between the franchisor and the bank or trust company, shall take a form substantially as follows:

ESCROW AGREEMENT

Agreement, made this _____ day of _____, 19____, by (name of franchisor) a (type of business entity) organized under the laws of the State of _____ (hereinafter referred to as _____) and (name of bank) (hereinafter referred to as "BANK"), a banking association organized under the laws of the State of _____ as Escrowee for the franchisees of (name of franchisor);

WHEREAS, (name of franchisor) is desirous of establishing franchises in the State of Illinois and

WHEREAS, it is in the discretion of the Attorney General as Administrator of the Franchise Disclosure Act of Illinois, to require an escrow of franchise fees and

WHEREAS, in order to conform to the procedures for arranging an escrow account, (name of franchisor) desires to enter into an escrow agreement with the BANK, pursuant to which franchise fees are to be held in escrow for the purpose of complying with the Franchise Disclosure Act.

NOW, THEREFORE, with the foregoing recitals hereinafter incorporated by reference and made part hereof, it is agreed as follows:

1. (Name of franchisor) shall deposit with BANK all monies obtained from each franchisee.

2. All monies received by the BANK from (name of franchisor) on behalf of each franchisee shall be held by BANK in a separate account as escrowee for the exclusive purpose herein described and subject to the following provisions.

3. That all funds delivered by (name of franchisor) to BANK will be placed in a separate account designated substantially as follows:

(Name of bank), as trustee for franchisees of (name of franchisor) (hereinafter referred to as "Escrow Account").

4. With respect to the payment or disbursement of funds deposited in the Escrow Account with the BANK, the BANK shall accept such funds to be held in escrow as the franchisor shall deliver to the BANK, as escrow agent, together with a written receipt, identifying the parties, purchase price, date and source of the proceeds deposited and shall verify the receipt of funds from (name of franchisor).

5. The BANK shall pay out such funds plus interest, if any, from the Escrow Account upon the occurrence of one of the following conditions:

i. A letter from the President or Secretary of (name of franchisor) directing the BANK to pay out such funds to (name of franchisor) accompanied with a written notice from the Attorney General stating that he takes no exception (hereinafter referred to as "No Exception Notice") to the release to (name of franchisor) and appropriate verification thereto, that (name of franchisor) has completed all of its initial obligations with each respective franchisee, such obligations include but are not limited to training and supervision.

ii. Upon written notice from the Attorney General the BANK shall return the deposited franchise fee to a specific franchisee.

iii. BANK, as escrowee, shall pay funds into court or disperse or deliver them in accordance with any final order of any court of competent jurisdiction.

6. (Name of franchisor) will supply BANK with the name and address of each franchisee, together with the amount of the deposit which represents said franchisee's fee, and BANK will maintain records containing the same information.

7. Any funds deposited hereunder in the Escrow Account shall be invested and kept invested by the BANK in obligations of the United States, or savings accounts of the (name of bank) until they are to be disbursed as provided in Paragraph 5 hereof. All interest received and any increment thereon shall be added to the funds so deposited in the Escrow Account and shall be distributed as provided in Paragraph 5 hereof.

8. Written consent of the depository, (name of bank), to act in the capacity of escrowee shall be manifest upon the duly authorized execution of this Agreement. The Attorney General may, at any time, inspect the records of BANK, insofar as they relate to this Escrow Agreement. At the Attorney General's discretion, statements indicating status of escrow shall be furnished by BANK to the Attorney General. A duplicate original of said executed Agreement shall be filed with the Attorney General, Franchise Division, Springfield, Illinois 62706.

9. BANK shall be paid by (name of franchisor) for any expenses incurred by it or for its reasonable compensation for its services hereunder.

10. BANK'S duties as escrowee shall terminate upon final distribution of all monies received under this Agreement.

11. IN WITNESS WHEREOF, this Agreement has been duly executed, the parties intending to be legally bound hereby.

ATTEST:

_____
Its Secretary

By: _____
Its President BANK

_____
Its Secretary

By: _____
FRANCHISOR

(b) Guaranty of performance: If the franchisor is a subsidiary of another company whose financial statements demonstrate an ability to perform the obligations contained in the franchise agreements, the Attorney General may accept a guaranty of performance from the parent company. Such a guaranty shall take a form substantially as follows:

GUARANTY OF PERFORMANCE

For value received, (name of parent), a (type of business entity) organized under the laws of the State of _____ located at (address) absolutely and unconditionally guarantees the performance by its subsidiary, (name of franchisor), a (type of business entity) organized under the laws of the State of _____, located at (address) of all of the obligations of (name of franchisor) in accordance with the terms and conditions of its franchise registration in the State of Illinois, as the same have been or may hereafter be amended, modified, renewed or extended from time to time. This guaranty shall continue in force until all obligations of (name of franchisor) under the said franchise registration and Agreement shall have been satisfied or until liability to the franchisee under the franchise registration and Franchise Agreement has been completely discharged, whichever first occurs. (Name of parent) shall not be discharged from liability hereunder so long as any claim by the franchisee against (name of franchisor) remains outstanding. Notice of acceptance is waived. Notice of default on the part of (name of franchisor) is not waived. This guaranty shall be binding on (name of parent) and (name of franchisor).

In witness whereof, (name of parent) has, by a duly authorized officer, executed this guaranty at _____ _____ on this ___ day of _____, 19____.

BY: _____

Title: _____

Attest: _____

_____

Any agreement, other than the foregoing, shall be submitted to the Attorney General at least seven days prior to its execution.

(c) Performance or Surety Bond. In lieu of the foregoing provisions of this rule, if the Attorney General deems it to be in the public interest, the franchisor may post a performance or surety bond in an amount to be determined by the Attorney General; said bond to be issued by a corporate surety authorized to transact business in the State of Illinois conditioned upon the completion by the franchisor of its obligations under the franchise and other agreements.

Rule 306. Examination by the Franchise Division. Commencing the day following actual receipt, the Franchise Division shall examine all documents within twenty business days. The correspondent designated on the application shall be notified within such period if additional information is required, but not of receipt of the application. Such notice requiring additional information shall stop the twenty day period, to be commenced anew the first business day following actual receipt of the information, provided such information complies with the Act.

Rule 307. Registration. Registration is not complete until all documents and materials required by Sec. 16. of the Act and the General Rules and Regulations, any additional information or document required to be filed by the Attorney General under Sec. 10., and payment of the appropriate filing fee is received and examined by the Franchise Division. Such payment shall take the form of cash or certified check or United States postal money order made payable to the Attorney General of Illinois.

ARTICLE 4

REGISTRATION OF FRANCHISE BROKERS

Rule 400. Documents to file. Each franchise broker, as defined in Rule 110 and Sec. 3.(22) of the Act, selling or offering for sale franchises in the State of Illinois shall file with the Attorney General the following documents in duplicate:

(a) Franchise Broker Registration Application;

(b) Certification page;

(c) Salesmen Disclosure Form for each person who will be offering or selling franchises;

(d) Corporate, Individual or Partnership Acknowledgment;

(e) Uniform Consent to Service of Process or a statement which indicates the name, address and telephone number of the agent appointed by the franchise broker to receive process in the State of Illinois;

(f) Documentation of the appropriate net worth or acceptable alternative.

i. The net worth of a franchise broker who will accept cash or checks payable to such broker from a prospective franchisee must be not less than $50,000.

ii. The net worth of a franchise broker who will not accept cash or checks payable to such broker from a prospective franchisee must be not less than $5,000.

iii. Documentation must take the form of a balance sheet both certified to and prepared by an independent certified public accountant or an unaudited balance sheet accompanied by a statement which indicates the approximate date an audited balance sheet will be filed with the Attorney General.

iv. An acceptable alternative includes, but is not limited to, the filing with the Attorney General of a surety bond in the amount of $5,000 or $50,000 depending upon facts indicated in (f) (i) and (ii).

Rule 401. Registration. A registration is not complete until all documents and materials required by Sec. 16.1 of the Act, any additional information or document required to be filed by the Attorney General under Rule 400 and payment of the appropriate filing fee is received and examined by the Franchise Division. Such payment shall take the form of cash or certified check or United States postal money order made payable to the Attorney General of Illinois.

Rule 402. Notice of Broker and Salesperson Registration. The correspondent shall be notified by mail of the registration date of the broker. It shall be a prohibited practice within the meaning of Sec. 4. for a person to offer or sell a franchise until so notified of registration. The notice of registration shall include registration of each salesperson submitted with the registration application, unless otherwise notified.

ARTICLE 5

POST-REGISTRATION PROCEDURES

Rule 500. Uniform Franchise Offering Circular. A definitive form of Uniform Franchise Offering Circular, which incorporates any revision required by the Attorney General or includes the effective date of registration, must be presented to each prospective franchisee within the 7 day period referred to in Sec. 4.

Rule 510. Advertising. All advertising and promotional materials shall be filed with the Attorney General in a written form, which includes a transcript of all radio, television and audio visual advertising.

Rule 520. Exempt advertising following registration. Advertising statements and representations as hereinafter set forth are exempt from Rule 510 and Sec. 25. after registration is effected by the Attorney General if they include the following statement:

"These franchises are currently registered with the Attorney General of Illinois."

Statements other than the following may not be used:

(a) an offering circular will be distributed as required by law;

(b) the availability and method of obtaining an offering circular;

(c) name, address, or telephone number of the franchisor and the selling agency if not the franchisor;

(d) a brief description of the type of franchise offered;

(e) a brief description of the type of business to be conducted by the franchisee;

(f) the minimum cash investment, provided that numerical figure is in the offering circular on file with the Attorney General;

(g) the initial or total dollar investment (including lease and installment purchase obligations) required to be made by the franchisee, or if the total investment is variable, the method of its determination, or factors that determine the actual amount, and the probable range, and

(h) the cities, metropolitan areas or counties in which the franchise is offered.

Rule 530. Amendments. When filing documents to be amended, submit the following:

(a) Uniform Franchise Registration Application marked amendment and certification page;

(b) the requisite fee, which depends on whether the amendment is material or non-material, and

(c) each page which contains revised information designated by red underlining.

Rule 535. Termination of Salespersons. The franchisor, subfranchisor, or franchise broker shall notify the Attorney General by letter when a salesperson has voluntarily or involuntarily terminated employment.

Rule 536. Addition of Salespersons. The franchisor, subfranchisor or franchise broker shall file a Salesman Disclosure Form in duplicate for each salesperson to be registered. A separate certification page must be submitted in duplicate with each mailing but need not be mailed with each Salesman Disclosure Form. There is no fee for the addition of salespersons.

Rule 540. Renewal Registration Procedure. The franchisor or subfranchisor must submit the requisite fee and documents pursuant to Rules 301 and 302 at least 20 business days (one month) prior to the expiration date.

ARTICLE 6

SUSPENSION, TERMINATION, PROHIBITION OR DENIAL OF SALES OR REGISTRATION

Rule 600. Preamble. Sec's. 4, 6, and 18. of the Act and Article 6 of these Rules enumerate grounds for an order by the Attorney General to suspend, terminate, prohibit or deny the sale or registration of a franchise and the registration of a franchise broker or salesperson.

Rule 601. Fraudulent Practices. The sale of a franchise constitutes a misrepresentation, deceit or fraud upon franchise purchasers or a fraudulent or deceptive practice within the meaning of Sec. 6.(1) of the Act when the franchisor, subfranchisor, franchise broker or salesperson or any person participating in the offer or sale of the franchise:

(a) Applies or authorized or causes to be applied any material part of the proceeds from the sale of a franchise in any material way contrary to the purpose specified in advertising or oral representations utilized in connection with the offer or sale of such franchise or in the disclosure statement utilized in connection with the offer or sale of such franchise or

(b) Makes or causes to be made oral or written statements or representations with regard to:

(1) The exclusivity of the franchise rights granted to the franchisee without disclosing the exact nature thereof;

(2) Industry wide sales representations or a portion thereof applicable to the prospective franchise purchaser, whether actual or projected, for the product or service marketed by the franchisor without disclosing the relationship, if any, of such representations to the franchisor's and its franchisee's actual sales experiences;

(3) The actual sales or income experiences of the franchisor or its franchisees except as permitted in the requirements for preparing a Uniform Franchise Offering Circular or in a statement of policy issued by the Attorney General;

(4) The net worth of the franchisor or its affiliated companies without disclosing whether and from what source the most recent certified audited or unaudited financial statements of the franchisor or its affiliated companies are obtainable;

(5) The franchisor's affiliation with any person or business entity, without disclosing the legal nature thereof;

(6) The endorsement or approval of the franchise or its business by any person or business entity without disclosing the nature of such endorsement or approval and the compensation being given, if any, by the franchisor or the franchisees to such person or business for the giving of such approval or endorsement;

(7) The date by which a prospective franchisee's business will be totally operational without disclosing the basis on which that date has been determined or is estimated;

(8) The advertising support to be provided by the franchisee, by the franchisor or others, without disclosing the means by which the funds for such advertising are to be raised and spent and the manner by which franchisees may obtain an accounting of such expenditures;

(9) The nature and number of the locations appropriate for the franchisee's enterprise, whether or not to be obtained by the franchisor, without disclosing by whom such sites are to be secured, the manner by which their procurement is to be financed, the

terms for such financing, the relationship, if any, between such site procurement and the execution of a franchise agreement, with whom, if anyone, the franchisor has a binding obligation for the procurement of such locations, and whether use of such site by the franchisee will create an obligation on the part of the franchisor or franchisee to any third party;

(10) Any payment, giving of consideration, contract, release, or execution of any negotiable or other written instrument or portions thereof to be executed in furtherance of the consummation of a franchise purchase without disclosing the material provisions thereof and the significance of execution, tender, or delivery thereof in the franchise sale transaction;

(11) The willingness of other individuals to enter into a franchise agreement substantially similar to that being offered or sold without disclosing the source of such information and the identity, including names and addresses, of such individuals;

(12) The total number of franchises substantially similar to the franchise being offered or sold which are established or to be established in a geographical area without disclosing graphically the area discussed and whether such franchises are operating;

(13) The qualifications or experience, if any, a prospective franchisee should possess without disclosing what additional personnel will be required for operation of the franchisee's business if such qualifications or experience are not possessed by the prospective franchisee;

(14) The extent of training, supervision and technical assistance, if any, to be provided by the franchisor under the franchise agreement without disclosing the cost of such training, supervision, or technical assistance to the franchisee and the effect of failure of the franchisee to participate therein in accordance with any provisions of the franchise agreement;

(15) Recovery of a portion or all of a franchise fee or other investment in a franchise without disclosing whether such franchise fee or other investment is secured or guaranteed and, if so, in what manner,

of time, based on the actual experience of other franchisees of the franchisor, the franchisee might expect to recover the franchise fee or other investment;

(16) The application for a franchise agreement without discussing that such document constitutes only an application and not the agreement by which such franchise is being or will be sold;

(17) Aid or assistance to be given by the franchisor to the franchisee in training, obtaining locations for conducting business or in marketing the product or service of the franchisor without citing the contractual provisions in the franchise or other agreement obligating the franchisor to do the same or if none, so stating to the franchisee prior to execution of the franchise agreement, or

(c) Makes any representation with regard to:

(1) Approval of or endorsement of a franchise or a franchisor by the Attorney General or the Franchise Division, any other agency of the State of Illinois, any other public agency or by employees of any of them;

(2) A finding by any public agency or by its agents or employees that any contents of a disclosure statement or advertising is true and not misleading;

(3) The name of the State of Illinois or any agent thereof or the name of any public agency or of any agents or employees of any of them in connection with promoting, advertising, offering or selling a franchise other than to state that compliance with applicable laws has been accomplished and to demonstrate the same by a showing of copies of correspondence or official records to that effect; or

(d) When a relationship exists between the franchisor and any other person which has offered, is offering or will offer a franchise program substantially similar to that being offered or sold, fails to state the nature of such relationship and to disclose the similarity, if any, of the trademark, service mark, trade name or commercial symbol and marketing plan of the other person to that of the franchise being offered or sold; or

(e) Misrepresents:

(1) That execution of any document in connection with the offer or sale of a franchise constitutes only an application for such franchise when, in fact, execution of the document or documents creates a binding obligation;

(2) The number of franchises of the franchisor of the same or similar type which are conducting business or have conducted business within a given area at any time;

(3) That the franchise agreement and all of its obligations is or are embodied in one or several documents presented to, made available to, or executed by the prospective franchise purchaser when, in fact, the execution of additional documents or the giving by the franchise purchaser of additional consideration is required for the purchase of the franchise or execution of one or more of such documents is not related to or necessary to consummate the purchase of such franchise; or

(f) Causes an advertisement or any form of statement to appear in the media offering for sale or describing a franchise not then registered with the Attorney General, except as permitted in Sec. 21.(c).

Rule 602. False, fraudulent, misleading and deceptive advertising.

The Attorney General has determined that prohibited advertising or promotional materials include but are not limited to the following:

(a) An oral or written statement offering to sell a franchise that states or implies that the franchise is a safe investment, is free of risk of loss, or will guarantee a profit to the franchisee;

(b) An oral or written statement that the franchise or franchise representatives or salespersons have been approved or endorsed by any public agency or any employee thereof;

(c) Projections, estimates, or actual data that does not contain an appropriate legend or that is not included or referenced within the Uniform Franchise Offering Circular;

(d) An oral or written statement which contains any projections or estimates of sales or profits of a franchise, or the actual sales volumes or profits of one or more franchisees, that are not substantiated or qualified by data available to the franchisor;

(e) An oral or written statement by a public figure that is not qualified in the manner required by the Uniform Franchise Offering Circular.

Rule 603. Failure to Diligently Prosecute Application. When an application for registration of a franchise or franchise broker has been on file with the Attorney General for a period of six months and has not become effective or registered, the Attorney General may, in his discretion, proceed in the following manner to determine whether the application has been abandoned by the applicant.

(a) A notice will be sent to the applicant and the correspondent by registered or certified mail, return receipt requested, addressed to the most recent addresses for the applicant and the correspondent as contained in the application. The notice will inform the applicant and correspondent that the application is out of date and must either be amended to comply with the applicable requirements or withdrawn within 30 days after the date of the notice.

(b) If the applicant or correspondent fails to respond to such notice by filing a substantive amendment or withdrawing the application and does not furnish a satisfactory explanation as to why it has not done so within 30 days, the Attorney General may, in his discretion, enter an order declaring the application abandoned and may deny such application.

(c) When such an order is entered by the Attorney General, the fee paid upon the filing of the application will not be returned.

(d) All papers comprising the application, with the exception of the application form, offering circular, correspondence, and other official papers, will be removed from the files of the Attorney General. The application form will be plainly marked in the following manner: "Declared abandoned and denied by order dated _____."

Rule 604. Conditions affecting the soundness of a franchise in accordance with Sec. 18.(a)(10). Conditions which affect the soundness of a franchise include, but are not limited to the following:

(a) The capitalization, nature of assets, net worth, income or cash flow of a franchisor or subfranchisor are insufficient to enable the franchisor or subfranchisor to satisfactorily meet current and proposed obligations.

(b) A participation or other interest in a pyramid or chain distributor scheme. For purposes of these Rules, a "pyramid or chain distributor scheme" is:

"any arrangement, plan, device, program or other means whereby a participant, in consideration of the payment of goods, services, or any other tangible or intangible property or right, (1) is granted the right to recruit one or more additional participants of the same or another class (whether or not the number or participants of any class is limited in any manner) each of whom received the same or similar right and (2) there is a reasonable probability that compensation, earnings or other pecuniary benefit will be derived by a participant promarily in consideration of the recruitment of one or more additional participants rather than from the sale of goods, services or other intangible property by such participant and others recruited by him."

Since the issuance of an order pursuant to Sec. 18(a)(10) is discretionary the Attorney General will take into consideration the following and other factors, such as: (1) whether the capitalization, net worth, income or cash flow of the franchisor or subfranchisor can be increased; (2) whether a list of risk factors in the Uniform Franchise Offering Circular, an escrow of franchise fees, a surety bond or a guarantee of performance are appropriate alternatives to prohibiting the offer of the franchise; (3) whether the franchisor or subfranchisor has a record of past performance or has substantial number of successfully operating franchisees of the same type as the franchise being offered; (4) the extent to which franchisees will depend upon goods or services to be provided by the franchisor or subfranchisor; (5) whether the net worth of the franchisor or subfranchisor exceeds or is less than $100,000; (6) whether the pyramid plan or scheme can be modified or revised.

ARTICLE 7

HEARINGS

Rule 700. Preamble. The regulations contained in this Article shall govern every hearing before the Hearing Officer of the Office of the Attorney General. The purpose of this Article is to provide for the orderly determination of rights, duties and privileges of parties appearing before the Attorney General or his representative under procedures assuring such parties due process of law.

Rule 701. Definitions.

(a) "Hearing" means a proceeding conducted by the Franchise Division in which the rights, privileges, immunities, duties or obligations of any person or party are required by law to be determined by the Attorney General only after opportunity for a hearing.

(b) "Party" means such person named as petitioner or respondent(s in such hearing.

(c) "Hearing Officer" means a person designated by the Attorney General to preside at any hearing conducted by the Franchise Division of the Office of the Attorney General. Such person must meet the following standards and qualifications:

(1) be of high integrity and of good personal repute;

(2) be admitted to practice law in the State of Illinois and must be a member in good standing of the Bar of Illinois;

(3) be familiar with the Rules of Evidence, the Franchise Disclosure Act of Illinois and the Rules and Regulations promulgated thereunder;

(d) "Department" means the Franchise Division of the Office of the Attorney General.

(e) "Office" unless otherwise clarified, refers to the Office of the Attorney General, and not to any particular address or location.

(f) "Attorney General" means the Attorney General of the State of Illinois.

Rule 702. Notice of Hearing.

(a) Notice of hearing shall be delivered to all respondent(s) to the proceeding either in person or by certified or registered U. S. mail with return receipt requested, not less than 10 days prior to the initial date of such hearing, or any proper extension thereof.

(b) The notice shall include:

(1) the names and last known addresses of all respondent(s);

(2) the time, date and place of hearing;

(3) the name of the Hearing Officer;

(4) a short and concise statement of facts (as distinguished from conclusions of law or a mere recitation of the words of the statute) alleging the act or acts done by each respondent(s); the date and place each such act was done; the rule or statute, if any, alleged to have been violated or otherwise involved in the proceeding; and the decision or action requested by the petitioner;

(5) a concise statement to each respondent(s) that: (i) the respondent(s) may be represented by legal counsel; may present evidence; may cross-examine witnesses and otherwise participate; (ii) failure to so appear shall constitute default unless any respondent(s) has upon due notice moved for and obtained a continuance; (iii) delivery of notice to the designated representative of a respondent(s) constitutes service upon the respondent(s);

(c) Any such notice required by this Rule may be waived with the consent of the parties.

Rule 703. Requirements Relating to Continuances. Certain costs are incurred by the Department when a scheduled hearing is continued to another time, date or place. Therefore, the requirements for a continuance are as follows:

(a) All requests for a continuance shall be in writing and must be received by the Department at least three days prior to the assigned hearing date;

(b) A party requesting a continuance shall serve a copy of the request on all parties in the same manner as provided in Rule 702;

(c) The request for a continuance creates no presumption that a continuance will be granted by the Hearing Officer;

(d) The requirements of this Rule may be waived at the discretion of the Department.

Rule 704. Evidentiary Rules to be Followed in Hearing.

(a) The Hearing Officer shall have authority to conduct the hearing, to administer oaths, to examine witnesses, and to rule upon the admissibility of evidence.

(b) The Hearing Officer shall rule on procedure and may make findings of fact and law. The final decision in all hearings shall be made as directed by the Attorney General.

(c) Any relevant evidence may be admitted if it is the type of evidence relied upon by reasonably prudent men in the conduct of their affairs, regardless of the existence of any common law or statutory rule which excludes the admission of such evidence over objections in civil actions. The rules of privilege shall be followed to the same extent that they are recognized in civil or criminal actions. Irrelevant, immaterial and unduly repetitious evidence may be excluded. Objections to evidentiary matters must be timely made and noted in the record. When a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form. Subject to the evidentiary requirements of this subsection, a party may conduct the cross-examination required for a full and fair disclosure of the facts.

(d) Notice may be taken of matters of which the Courts of Illinois may take judicial notice. In addition, notice may be taken of the Department's specialized knowledge in franchises. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, and shall be afforded an opportunity to contest the material so noticed.

(e) Upon timely written demand made, a party shall furnish to other parties a list of the names and addresses of prospective witnesses and a bill of particulars.

(f) Subject to grants of confidentiality under the Act upon timely motion, any party shall have the right to inspect any documents in the possession of or under the control of any other party and to interview parties or persons having knowledge of facts. Inspection of documents and interviews of persons shall be at times and places reasonable for the person to be interviewed and for the custodian of the documents.

(g) Oral evidence shall be taken only on oath or affirmation.

(h) Each party shall have the right to request the subpoena of and to call and to examine the witnesses; to introduce exhibits and to cross-examine witnesses on any matter relevant to the issues, even though that matter was not covered in the direct examination. Application for subpoenas duces tecum shall specify the books, papers, and accounts to be produced.

(i) Subject to grants of confidentiality under the Act a party may serve on any other party a written request for the admission by the latter of the truth of any specified relevant fact set forth in the request or for the admission of genuineness of any relevant documents described in the request. Copies of the documents shall be served with the request unless copies have already been furnished.

(j) Upon the opening of the hearing, the Hearing Officer shall allow opening statements to be made. Opening statements may not be made at any other time, except in the discretion of the Hearing Officer. Upon the close of the hearing each party may make a closing statement orally and/or by written brief at the discretion of the Hearing Officer, incorporating arguments of fact and law.

(k) In the hearing of any matter, any party or his agent may be called and examined as if under cross-examination at the instance of any adverse party. The party.calling for the examination is not bound thereby, but may rebut the testimony thus given by counter-testimony and may impeach the witness. If the Hearing Officer determines that a witness is hostile or unwilling, the witness may be examined by the party calling him as if under cross-examination. The party calling a witness in good faith but is surprised by his testimony, may impeach the witness.

(l) Each party shall have the right to rebut the evidence against him, to appear in person, and to be represented by counsel. If a party does not testify in his own behalf, he may be called as an adverse witness and examined as if under cross-examination and be impeached.

(m) Upon order of the Hearing Officer, for good cause shown, and upon reasonable notice to other parties, any party, including the Department, amy take a discovery or evidence deposition of any witness or party. The deposition shall be taken in the manner provided by law for such depositions in civil actions in the Circuit Courts of Illinois.

(n) At the request of any party, the Hearing Officer may call a pre-hearing conference. At the conference, the parties, or their representatives, shall appear as the Hearing Officer directs to consider:

(1) the simplification of the issues;

(2) amendments to the grounds for action;

(3) the possibility of obtaining admissions and stipulations of fact and documents which will avoid unnecessa y proof;

(4) the limitation of the number of expert witnesses;

(5) any other matters which may aid in the disposition of the hearing.

(o) Upon the conclusion of a pre-hearing conference, the Hearing Officer shall enter an order which recites any action taken, any agreements made by the parties as to any of the matters considered, and the issues to be heard.

Rule 705. Record of roceedings.

(a) A qualified court re orter called by the Department, at its expense, shall b present at each hearing and shall take a permanent and complete record of the proceedings.

(b) Upon request, and at his own expense, any party may have a copy of the record.

Rule 706. Record of Hearing. The record of the hearing shall include:

(a) All pleadings (including all pre-hearing and post-hearing notices and responses thereto, admissions, stipulations of facts, motions and rulings thereon;

(b) A statement of matters officially noted;

(c) Any opinion, report, or recommendation of the Hearing Officer to the Attorney General or his representative;

(d) The findings of fact and law and final order entered by the Attorney General.

Rule 707. Final Order.

(a) A final order of the Attorney General in a hearing shall be in writing. A copy of the final order shall be delivered or mailed to each party or his representatives.

(b) The final order of the Attorney General shall constitute a final administrative decision within the provisions of the Illinois Administrative Review Act, approved May 8, 1945. (Ill. Rev. Stats. ch. 110, sec. 264 et seq.)

No. 83-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DALE M. CARTER,

Appellant,

v.

STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The Appellee, STATE OF ILLINOIS, respectfully moves this Court to dismiss this appeal on the following grounds:

1. The appeal is not within this Court's jurisdiction;
2. The appeal does not present a substantial federal question;
3. The appellant seeks review of questions not properly raised before and expressly passed upon by the Illinois Supreme Court.

In the alternative, the Appellee moves this Court to affirm the judgment of the Supreme Court of Illinois, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED BECAUSE THIS COURT DOES NOT HAVE JURISDICTION OVER APPELLANT'S CHALLENGE TO THE CONSTITUTIONALITY OF SECTION 12 OF THE ILLINOIS FRANCHISE DISCLOSURE ACT.

Appellant was convicted, on counts I, II and IV of the indictment, of violating: sections 4(1) and 16 of the Illinois Franchise Disclosure Act (the Act), in that he sold an unregistered franchise; section 4(2) of the Act, in that he failed to provide a disclosure statement to the prospective franchisee prior to sale; and section 16.1 of the Act, in that he failed to register franchise salespersons. Ill. Rev. Stat. 1981, ch. 121½, ¶¶ 704, 716, 716.1. In the state courts, he made no attack on the constitutionality of those provisions, but sought a reversal of his conviction by alleging the facial unconstitutionality of section 12 of the Act. Ill. Rev. Stat. 1981, ch. 121½, ¶ 712. That section authorizes the Attorney General, as Administrator of the Act, to grant exemptions from certain of its requirements. Rule 206 of the General Rules and Regulations Under the Franchise Disclosure Act outlines the application procedure for an order of exemption. It is undisputed that appellant never applied for a section 12 exemption.

The Illinois Supreme Court acknowledged the State's argument that appellant lacked standing to attack the validity of section 12 and conceded that "this contention [was] not entirely without merit . . . ." *People v. Carter*, 97 Ill. 2d 133, 454 N.E.2d 189, 190 (1982). Nonetheless, that Court, in the exercise of its discretion, elected to decide the constitutional question presented. That deci-

sion cannot, however, preserve for review the federal questions which plaintiff seeks to raise before this Court on Fourteenth Amendment grounds.

Justice Rehnquist, in denying an application for bail pending certiorari in *Bateman v. Arizona*, 429 U.S. 1302, 1305 (1976), explained that:

> [t]he courts of a State are free to follow their own jurisprudence as to who may raise a federal constitutional question, but this Court in reviewing a state-court judgment is bound by the requirements of case and controversy and standing associated with Art. III of the United States Constitution.

Thus, he deemed it unlikely that the full Court would accept Bateman's challenge to the constitutionality of a state statute which had been construed to prohibit certain sexual acts between consenting adults, when Bateman had been convicted of nonconsensual conduct. Similar reasoning had in fact resulted in dismissal of the appeal in *Doremus v. Board of Education*, 342 U.S. 429 (1952), and directs the proper result in the instant case as well.

Having declined to seek an exemption under section 12, the appellant was obliged to comply with the requirements of the Act and was properly convicted of his failure to do so. He is without standing to mount a theoretical challenge to the basis upon which exemption decisions may be made, because his possible entitlement to an exemption never became an issue. Appellant's attack on section 12 presents no case or controversy to this Court, which, consequently, is without jurisdiction to decide whether the Illinois Supreme Court erred in finding that statute to be constitutional.

II.

SECTION 12 OF THE ACT, AUTHORIZING THE ADMINISTRATOR TO GRANT EXEMPTIONS FROM REGISTRATION AND DISCLOSURE REQUIREMENTS, DOES NOT VIOLATE FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

Appellant mischaracterizes section 12 as a statute granting the Attorney General "unmitigated" power "to amend or repeal the statute at will" and premises his allegations of constitutional violations upon that mischaracterization. Section 12, as authoritatively construed by the Illinois Supreme Court, does not authorize administration of the Act in an arbitrary manner. Thus, even assuming that appellant had raised a justiciable case or controversy to this Court, his attacks on section 12 do not present a substantial federal question. His appeal should, therefore, be dismissed, or the Illinois Court's decision should be affirmed. *Sugarman v. United States*, 249 U.S. 182 (1919).

Under section 4(1) of the Act, "[i]t is unlawful for any franchise to be offered for sale or sold in this state by any person who is subject to this Act and is not first registered pursuant to Section 16.1 unless exempt from registration." Ill. Rev. Stat. 1981, ch. 121½, ¶ 704(1). Section 12 authorizes the Attorney General, as Administrator of the Act, to grant, subject to such terms and conditions as he may prescribe, exemptions from the filing and registration requirements of the Act, "if he finds that the enforcement of [the] Act is not necessary in the public interest . . . ." Ill. Rev. Stat. 1981, ch. 121½, ¶ 712.

Observing that "the purposes of the Act are to protect the investments of people buying franchises and to insure that before entering into a franchise agreement [investors] are fully informed of the franchisor's financial condition,"

the Illinois Supreme Court found that these purposes provided a context for the "public interest" criterion under which the Attorney General might grant a section 12 exemption. *People v. Carter*, 97 Ill. 2d 133, 454 N.E.2d 189, 191 (1982). This finding was consistent with the ruling in *American Power & Light Co. v. Securities & Exchange Commission*, 329 U.S. 90 (1946), where this Court explained that standards for delegation of authority to an administrative agency should not be evaluated in isolation, but must be examined in light of the purpose of the Act in which they appear, their statutory context, and the factual background of the enactment. Indeed, this Court had applied those very standards to uphold a delegation of authority to the Interstate Commerce Commission, where the stated criterion for exercise of that authority was the "public interest." *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24 (1932).

Because the information needed to accomplish the Act's goals might be otherwise readily available to potential franchisees or subfranchisors, the Illinois court noted that under such circumstances, the Attorney General could indeed find it unnecessary to enforce the registration requirements with respect to a particular franchisor. Thus, the "public interest" standard was found to be an intelligible one; it authorized the Attorney General to grant an exemption where a potential franchisee or subfranchisor would already have available, from other public sources, the same information which the Act's registration and disclosure requirements would have provided to him. This construction of section 12 by the state court fixed the meaning of that statute for the purposes of this case, as definitely as if the General Assembly had specified the interpretation. *Winters v. New York*, 333 U.S. 507, 514 (1948). Given this authoritative statement of the Illinois

court, the statute easily survives plaintiff's constitutional challenges.

The Act is readily identifiable as an example of local economic regulation.* In *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), this Court stated the rule for reviewing an equal protection challenge to such an act:

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. (citation omitted).

The Act sets forth registration requirements applicable to all franchisors and entitles all of them to seek exemptions from registration and disclosure requirements. The only "classification" authorized by section 12 is the distinction between those applicants who will receive an exemption and those who will not. That distinction will be controlled by an eminently reasonable test: an exemption may be granted when the information which would otherwise be required in the form of disclosure and registration is already available to those whom the Act would seek to protect by providing that information. In other words, where registration is not necessary to achieve the Act's purposes, as reiterated by the Illinois Supreme Court, an exemption is appropriate.

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* The imposition of criminal penalties for failure to comply with the requirements of such a statute does not exclude it from being characterized as a type of economic regulation. *See Ferguson v. Skrupa*, 372 U.S. 726 (1963).

The classification made between those who will receive an exemption and those whose request will be denied is rationally related to the state interest of protecting potential franchisees, an interest whose legitimacy has never been questioned in these proceedings. No fundamental right is implicated by the Attorney General's decision to grant or deny an exemption, as there is no criminal sanction for the failure to seek or gain such an exemption. A would-be franchisor is not threatened with a deprivation of personal liberty on the basis of a refused exemption; he is simply obliged to comply with the requirements of the Act, due to a rational distinction between his situation and those of exempted franchisors.

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), relied upon by appellant in support of his Due Process and Equal Protection claims, this Court examined ordinances which were found to confer upon certain local government officials "not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent . . . ." 118 U.S. at 366. Although that case was disposed of on equal protection grounds, it has come to be recognized that legislation permitting arbitrary governmental action implicates substantive due process rights. *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977). However, as this Court has stated, "[i]f the laws passed [by a State] are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . ." *Nebbia v. New York*, 291 U.S. 502, 537 (1934). Under this test, which is reminiscent of that applicable to equal protection cases, section 12 easily survives appellant's due process challenge. Section 12's "public interest" criterion provides an adequate basis for

the exercise of the Attorney General's discretion and does not permit the arbitrary action which would run afoul of the Due Process Clause. Moreover, the Act unquestionably has a reasonable relation to the legislative purpose of protecting Illinois investors, a purpose which, as previously noted, is not challenged by the appellant.

It is unnecessary for this Court to require briefs on the merits of the issues raised by the appellant, as the constitutional challenges he makes to section 12 of the Act are insubstantial. Therefore, this appeal should be dismissed or, alternatively, the decision from which the appeal is taken should be summarily affirmed.

III.

APPELLANT HAS WAIVED THE SECOND AND THIRD QUESTIONS WHICH HE HAS RAISED TO THIS COURT.

This Court has consistently refused to decide federal constitutional issues which were not raised in and passed upon by the courts below. *Tacon v. Arizona*, 410 U.S. 351 (1973); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). This rule is applicable to the second and third questions raised by appellant in his Jurisdictional Statement. He cannot rely on those points to urge reversal of the decision of the Illinois Supreme Court.

In question #2, appellant requests a determination that certain language in section 32 of the Act, Ill. Rev. Stat. 1981, ch. 121½, ¶ 732, renders the criminal provisions of the Act unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Section 32 vests the Attorney General with discretion to withhold from public inspection documents which he has received under the Act when, in his judgment, such disclosure is not necessary in the public interest or for the

protection of franchisees or subfranchisors. Information withheld is, however, made subject to disclosure "when necessary or appropriate in a proceeding or investigation under this Act or to other federal or state regulatory agencies." Ill. Rev. Stat. 1981, ch. 121½, ¶ 732.

The opinion of the Illinois Supreme Court makes no reference whatsoever to section 32. Indeed, the appellant never argued to that court that the language of section 32 demonstrated the Act's alleged unconstitutionality under the Fourteenth Amendment. Examination of appellant's state supreme court brief, at the pages referenced on page 4 of his Jurisdictional Statement, reveals no reference to section 32 in connection with any federal constitutional claims. In fact, appellant cited section 32 only in his separation of powers argument—an argument predicated upon state law grounds, as appellant expressly acknowledged at page 25 of that brief. Clearly, the federal question which he now frames with respect to section 32 was neither raised in nor passed upon by the state court from which he appeals.

Appellant's third question to this Court seeks a determination that section 6 of the Act, Ill. Rev. Stat. 1981, ch. 121½, ¶ 706, is void for vagueness, invoking the rule that a statute is void on its face, as violative of due process, if it is so vague and indefinite as to permit punishment of protected behavior. *See, Winters v. New York*, 333 U.S. 507 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). As was true of the second question, appellant's third issue is not properly raised before this Court as it was not passed upon in the Illinois courts. The appellate court specifically declined to address the void-for-vagueness question, while the supreme court addressed only the sufficiency of the charge contained in Count III of the indictment. Far from having preserved this issue for

review, appellant acknowledged, in the Illinois Supreme Court, that the pertinent section 6 language was "good on its face." Ill. Sup. Ct. Brief for Appellee at 40.

In a federal system, it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of a constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). For this reason, it would be inappropriate for this Court to consider appellant's belated challenge to the constitutionality of section 6 of the Act.

Finally, the State recognizes that appellant's third question also raises the alleged unconstitutionality of Count III of the indictment. It must be observed, however, that despite this Court's requirement in Supreme Court Rule 15(1)(h) that a Jurisdictional Statement include a statement of reasons why the questions presented are so substantial as to mandate plenary consideration, appellant's Jurisdictional Statement offers no such reasons with reference to Count III. Instead, he confines himself to the briefest possible summary of Justice Moran's dissenting opinion, where that Justice found a portion of section 6 to be invalid due to vagueness. From his reticence, it is obvious that appellant recognizes that his third question to this Court reflects no substantial question properly preserved for review. His appeal should be dismissed on that basis.

CONCLUSION

For the foregoing reasons, the appellee, STATE OF ILLINOIS, moves for dismissal of this appeal, or in the alternative, for affirmance of the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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No. 83-918

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vs.

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On Appeal From The Illinois Supreme Court

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REPLY BRIEF OF APPELLANT

I.

The State suggests that appellant has no standing to attack the act. Two short answers:

1. The Illinois Supreme Court, after noting the standing issue, reached the merits. That means that under Illinois law appellant *does* have standing even though the Attorney General regrets it.

2. If anyone can ever have standing for federal law purposes in a criminal case it is the man who is convicted under a statute which is unconstitutional on its face and who challenges that conviction for that reason. The statute is either constitutional on its face or it isn't. If it is, then this appellant goes to prison. If it isn't, then he doesn't. That means he has standing.

II.

The State says that appellant "never argued to [the Illinois Supreme Court] that the language of Section 32 [the secrecy section] demonstrated the act's alleged unconstitutionality under the Fourteenth Amendment." Appellee's Motion p. 9. But in fact, appellant's Illinois Supreme Court brief, p. 5, charges that Section 12 ". . . also violates due process and the equal protection of the laws. Those violations are compounded by the additional delegation to the Attorney General of power to keep his orders secret from the public if he decides *that* is 'in the public interest.' (FDA §32)"

Respectfully submitted,

.....

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